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In the
Supreme Court of the United States
October Term, 2000

JESSE LEE BROWN AND RONALD J. BERGERON ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Anthony J. Nemo
Counsel of Record
Ronald I. Meshbesher
MESHBESHER & SPENCE, LTD.
1616 Park Avenue South
Minneapolis, MN 55404
(612) 339-9121

Hugh V. Plunkett III
Robert K. Shelquist
LOCKRIDGE GRINDAL NAUN P.L.L.P.
100 Washington Ave. South
Suite 2200
Minneapolis, MN 55401-2179
(612) 339-6900

John A. Cochrane
COCHRANE & BRESNAHAN
24 East Fourth Street
St. Paul, MN 55101
(651) 298-1950

Attorneys for Petitioners

2001 - Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER AN IMPERMISSIBLE TAKING OF PROPERTY WITHOUT JUST COMPENSATION OCCURS, IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHEN A STATE UNILATERALLY SETTLES FUTURE DAMAGES CLAIMS BELONGING TO MEDICAID RECIPIENTS WITHOUT NOTICE OR OPPORTUNITY TO BE HEARD AND WHERE THE STATE RETAINS THE SETTLEMENT PROCEEDS IN DEROGATION OF FEDERAL AND STATE STATUTES.

II. WHETHER DUE PROCESS IS VIOLATED WHEN A STATE UNILATERALLY SETTLES FUTURE DAMAGES CLAIMS BELONGING TO MEDICAID RECIPIENTS WITHOUT NOTICE OR OPPORTUNITY TO BE HEARD AND WHEN IT RETAINS THE SETTLEMENT PROCEEDS IN DEROGATION OF FEDERAL AND STATE STATUTES.

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OPINIONS BELOW

The opinion of the Minnesota Court of Appeals is reported at 617 N.W.2d 421 and reproduced in the Appendix to this Petition at App. A-2 to A-14.[1] The Order denying a petition for further review filed by the Minnesota Supreme Court is reproduced at App. A-1. The Judgement of the Hennepin County District Court, State of Minnesota is reproduced at App. A-15 to A-37.

JURISDICTION

The Minnesota Court of Appeals issued its opinion on September 19, 2000. A Petition for Further Review of that opinion was denied by the Minnesota Supreme Court on November 21, 2000. This petition was timely filed within ninety (90) days of the denial of the petition for further review by the Minnesota Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS

1. The due process clause of the Fourteenth Amendment, § 1, U.S. Constitution provides, in part:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law...

2. The takings clause of the Fifth Amendment, U.S. Constitution provides:

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[1] All further references to the materials set-forth in the Appendix to this Petition will be made by "App. A-[page no.]."

> Nor shall private property be taken for public use, without just compensation.

3. The United States Code, 42 U.S.C. § 1396k(b) provides in relevant part:

> [After the State obtains full recovery] the remainder of such amount collected shall be paid to such individual [injured recipient].

4. Code of Federal Regulations, 42 C.F.R. § 433.154, provides in relevant part:

> [The State] must distribute collections as follows–(a) To itself, an amount equal to State Medicaid expenditures for the individual on whose right the collection was based. (b) To the Federal Government, the Federal share of the State Medicaid expenditures.... (c) To the recipient, any remaining amount.

5. The Minnesota Statutes, Minn. Stat. § 256B.37, subd. 4, provides in relevant part:

> Upon any judgment, award, or settlement of a cause of action, or any part of it, upon which the State Agency has a subrogation right...reasonable cost of collection...must be deducted first. The full amount of medical assistance paid to or on behalf of the person as a result of the injury must be deducted next and paid to the State Agency. The rest must be paid to the medical assistance recipient or other plaintiff.

6. The Minnesota Statutes, Minn. Stat. § 256B.042, subd. 5, provides in relevant part:

> Upon any judgment, award, or settlement of a cause of action, or any part of it, upon which the State Agency has filed its lien...reasonable costs of collection...must be deducted first, the full amount of medical assistance paid to or on behalf of the person as a result of their injury must be deducted next, and paid to the State Agency. The rest must be paid to the medical assistance recipient or other plaintiff.

STATEMENT OF THE CASE

This case calls into question a state's right to unilaterally settle 70,000 Medicaid recipients' medical damages claims against the tobacco industry without following federal statutory mandates to keep no more than the amount paid in past medical expenses. Petitioners Jesse Lee Brown and Ronald Bergeron are smokers who suffer from smoking-related disease. At various times between January 1, 1978 and December 1, 1996, Petitioners received medical treatment for their smoking-related disease which was paid, in whole or in part, by the State of Minnesota (the "State") pursuant to programs partially funded through the Federal Medicaid Program ("Medicaid Program") established under Title XIX of the Social Security Act. See 42 U.S.C. § 1396, et seq.; Minn. Stat. § 256B.01, et seq.; Minn. Stat. § 256D.01, et seq. The Medicaid Program allows states to receive federal funds of up to 60 percent of the money necessary to support the state programs that pay for medical services provided to low income and disabled persons. See 42 U.S.C. § 1396-1396v.

A state's participation in the Medicaid Program is entirely optional. However, once a state elects to participate in the Program, it must comply with the requirements of Title XIX. Harris v. McRae, 448 U.S. 297, 301 (1980). The participating state is required to submit a plan, backed by a state statutory scheme, that complies with the program act itself and all regulations passed by the Secretary of Health

and Human Services. See Schweiker v. Gray Panthers, 453 U.S. 34, 36 (1981). The state must take "all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services available under [Medicaid]." 42 U.S.C. § 1396a(a)(25)(A); see also 42 C.F.R. § 433.138(a). If the state determines that a third party is legally responsible for the condition which necessitated the expenditure of Medicaid Program funds, the state is required to "seek reimbursement for such assistance to the extent of such legal liability." 42 U.S.C. § 1396a(a)(25)(B); see also 42 C.F.R. § 433.138(d).

As a condition of eligibility to receive medical assistance under a state plan, a recipient of medical benefits also has certain obligations under the Medicaid Program. The recipient is required to assign to the state any rights to payment a recipient may have against a third party for the cost of medical care. The recipient must also cooperate with and assist the state in identifying and pursuing any third party who may be liable to pay for the care and services provided under the Medicaid Program. See 42 U.S.C. § 1396k(a)(1)(C); see also 42 C.F.R. § 435.610.

In the event that a State obtains full recovery from a liable third party for the amounts paid pursuant to its Medicaid Program (i.e. an amount which includes the federal matching funds), Title XIX demands that "the remainder of such amount collected shall be paid to such individual [injured Medicaid recipient]." 42 U.S.C. § 1396k(b) (emphasis added). This equitable distribution formula, entitling the Medicaid recipient to the difference between the amount collected from the liable third party and the amount necessary for the State to achieve full recovery, is underscored in the regulations passed by the Secretary of Health and Human Services:

> [The State] must distribute collections as follows–(a) To itself, an amount equal to State Medicaid expenditures for the individual on whose right the

> collection was based; (b) To the Federal Government, the Federal share of the State Medicaid expenditures....(c) To the recipient, any remaining amount.

42 C.F.R. § 433.154 (emphasis added).

Minnesota's state-run Medicaid Programs comply with federal law and require each recipient, as a condition precedent to receiving state-paid health care through one of two state-run Medicaid programs, to assign the State his or her right to payment from a liable third-party for the cost of the medical care provided. Depending upon the recipient's personal financial circumstances, medical care is provided and funded through either the State's general assistance ("GA") program or its medical assistance ("MA") program. Both programs have been approved by the United States Department of Health and Human Services, Health Care Financing Administration ("HCFA"). Both the GA and MA statutory schemes contain dual provisions which guaranty the State's right to receive at least partial reimbursement from liable third parties for the cost of treating GA and MA recipients. See Minn. Stat. § 256B.01, et seq. and 256D.01, et seq.

The first of these two statutory provisions, which guarantees the State's right to obtain payment for previously expended medical costs, automatically subrogates the State to all causes of action possessed by the recipient regardless of how the claim is prosecuted or how the allocation of recovery is characterized by a judgment or settlement:

> Upon furnishing medical assistance to any person who . . . has a cause of action arising out of an occurrence that necessitated the payment of medical assistance, the state agency or the state agency's agent shall be subrogated, to the extent of the cost of

> medical care furnished, to any rights the person may have . . . under the cause of action.
>
> The right of subrogation in this section includes all portions of the cause of action, notwithstanding any settlement allocation or a portion that purports to dispose of portions of the cause of action not subject to subrogation.

Minn. Stat. § 256B.37, subd. 1 (emphasis added). The State's subrogation interests arise automatically as a matter of law. See Martin v. City of Rochester, 615 N.W.2d 867, 869 (Minn. Ct. App. 2000), review granted (Minn. Oct. 17, 2000) (citing 42 U.S.C. § 1396k(a)(1)(A) and Minn. Stat. § 256.015).

The second statute automatically creates a lien, running in favor of the State, on all of the causes of action arising in favor of the injured recipient, regardless of how the claim is styled or the manner in which the settlement is apportioned:

> When the State agency provides, pays for, or becomes liable for medical care, it shall have a lien for the costs of care upon any and all causes of action or recovery rights . . . which accrue to the person to whom the care was furnished, or to the person's legal representatives as a result of the illness or injuries which necessitated the medical care.

Minn. Stat. § 256B.042, subd. 1 (emphasis added).[2] Although the lien arises as a matter of law, the Minnesota statutes provide a mechanism by which the State can perfect its lien

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[2] For ease of reference, Petitioners have only cited the GA provisions creating, respectively, a subrogation and lien interest running in favor of the State. The same statutory provisions with identical language are found in the MA provisions, Chapter 256D.

interest when a cause of action is prosecuted by an injured recipient against a liable third party.[3] See Minn. Stat. § 256B.042, subd. 2.

Both the MA and GA statutes specifically contemplate that either the injured party or the State may prosecute a claim against a liable third party. No matter who ultimately commences the lawsuit, however, the State is subrogated and liened by statute in order to secure its right to payment for past medical costs incurred on behalf of MA and GA recipients. See Minn. Stat. § 256B.37, subd. 2 and 256B.041, subd. 3. According to the State's Attorney General, the legal authority allowing either the State or the recipient to prosecute a claim against liable third parties is the State's MA and GA statutes which, he explained, create a "shared right" to prosecute a claim:

> Under the statute, the assignment by MA recipients to the State of the right to payment for medical care from liable third parties creates a "shared right" to bring a cause of action against those third parties.

App. A-38 to A-39.

Most importantly, the MA and GA statutory schemes provide a formula mandating how settlement or judgment proceeds are to be shared between the injured recipient and the State once a determination has been made as to the liability of a third party. See Minn. Stat. § 256B.37, subd. 4 and 256B.042, subd. 5. The Minnesota distribution formula first provides for the deduction of reasonable litigation costs

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[3] Minnesota's MA and GA statutes are distinct from the statutory schemes utilized in several other states in two important respects. First, there is not an outright assignment of a claim by the injured recipient to the State at the time medical care is provided. Second, the State's lien and subrogation interests run to the entire cause of action, not just to any allocation by a judge, jury, or other person of the amount attributable to past medical care costs.

and attorney's fees from the settlement or judgment. Id. Following this deduction, the Minnesota formula provides two alternative methods for allocating the remaining funds. First, consistent with federal law, the State will retain the full amount of MA or GA benefits paid (including the federal matching fund portion), and then the State must pay the remainder to the injured party. Id. Second, in recognition that the lien and subrogation interests run to the entire cause of action, the injured party is guaranteed 33 1/3 percent of the net recovery remaining after attorney's fees and costs are deducted. Id.

Against this statutory backdrop, the State of Minnesota filed a lawsuit in August 1994 against members of the tobacco industry captioned *The State of Minnesota, et al. v. Philip Morris Incorporated, et al.* which was venued in Ramsey County District Court, Minnesota (the "Tobacco Litigation"). In the Tobacco Litigation, the State sought to recover money it had spent to treat approximately 70,000 MA and GA recipients for smoking related disease.[4] In its Amended Complaint, the State specifically pled the state statutes (Minn. Stat. §§ 256B.01, et seq. and 256D.01, et seq.) through which the State had received Medicaid matching funds from the federal government that had been used to help pay the medical costs of treating the recipients' smoking-

[4] Prior to commencement of the Tobacco Litigation, Petitioners were putative class members prosecuting claims against the tobacco defendants in two, separate cases. The first case was being prosecuted in Louisiana under the caption Castano v. American Tobacco Co., Civ. No. 94-1044S (E.D. La., Feb. 17, 1995). The District Court's certification of a national class, however, was ultimately reversed. The second class action was being prosecuted in Florida under the caption, Engle v. R.J. Reynolds Tobacco Co., Civ. No. 94-08273 (11th Cir. Fla.). An element of damages that was sought in at least one of the class actions was specifically directed to the costs of treating persons suffering from smoking-related illnesses. Despite the State's automatic subrogation and lien interests against any recovery made by injured MA and GA smokers in the Castano or Engle class actions, the State chose to file an action of its own.

related illnesses. Although its Amended Complaint was styled as a "direct" action,[5] it is clear to Petitioners (and the trial judge so instructed the jury) that the State was seeking a "sum of money that will fairly compensate the State of Minnesota . . . for their [sic] payment of healthcare costs caused by smoking." App. A-40 to A-41.

In calculating its damages in the Tobacco Litigation, the State utilized an econometric model which identified public assistance recipients who suffered from smoking-related illnesses, and then used statistical modeling to extrapolate and calculate the precise sum of its damage claim. App. A-43 to A-51. An expert for the State testified at trial that the amount of money spent by the State to treat MA and GA recipients for smoking-related illnesses during the years 1978 through 1996 totaled $1.31 billion. App. A-50. This $1.31 billion figure included approximately $746 million (57%) of federal matching funds.[6]

During the course of discovery, the State was forced to disclose the names of 100 persons who had been diagnosed with smoking-related illnesses, whose treatment for such illnesses had been paid for by either the State's MA or GA program, and who were included in the State's damages calculation for past medical costs. Petitioner Jesse Lee Brown was identified by the State and, over the State's

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[5] Throughout the underlying litigation, the tobacco defendants challenged the State's standing to bring an action separate and apart from the statutes at issue in this action. The Minnesota Supreme Court elliptically affirmed the State's standing to prosecute a "direct" action in State by Humphrey v. Philip Morris, Inc., 551 N.W.2d 490, 496-97 (Minn. 1996).

[6] After the Tobacco Litigation was resolved through settlement, the federal government clarified that it would not seek reimbursement from the states for any federal matching funds that had been recovered by virtue of a state action against the tobacco defendants. See 42 U.S.C. § 1396b(d).

objection, deposed by the tobacco defendants as part of the State's Tobacco Litigation. App. A-52 to A-54.[7]

On May 8, 1998, at the close of evidence, but prior to the State's closing arguments, a comprehensive settlement agreement was entered into between the State and the tobacco defendants. App. A-55 to A-87. The settlement agreement expressly released the tobacco defendants from all liability for any claim seeking to recover MA or GA medical costs, regardless of whether the claim is prosecuted by the State or by the recipients:

> B. State of Minnesota's Release and Discharge. Upon Final Approval, the State of Minnesota shall release and forever discharge all Defendants...from any and all manner of civil claims, demands, actions, suits, and causes of action, damages whenever incurred, liabilities of any nature whatsoever, including civil penalties, as well as costs, expenses, and attorneys' fees, known or unknown, suspected or unsuspected, accrued or unaccrued, whether legal, equitable or statutory ("Claims") that the State of Minnesota . . . whether directly, indirectly, representatively, derivatively, or in any other capacity, ever had, now has, or hereafter can, shall, or may have, as follows:
>
> a. For past conduct, as to any claims relating to the subject matter of this action which have been asserted or

[7] The prime motivation driving this lawsuit was Petitioner Jesse Lee Brown's simple question to counsel: "How can the State say that the tobacco lawsuit had nothing to do with me when I gave a deposition and the State recovered money because of my injuries?" The Minnesota Appeals Court never acknowledged the fact that Petitioner Brown was identified by the State or deposed in the State's action.

could be asserted now or in the future in this action or a comparable federal action by the State; and

b. For future conduct, only as to monetary claims directly or indirectly based on, arising out of or in any way related to, in whole or in part, the use of or exposure to Tobacco Products manufactured in the ordinary course of business including without limitation any future claims for reimbursement for health care costs allegedly associated with use of or exposure to Tobacco Products . . ..

[T]he State of Minnesota agrees that this covenant and agreement shall be a complete defense to any such civil action or proceeding.

App. A-66 to A-68 (emphasis added). The settlement agreement describes the character of the settlement proceeds as compensatory in nature, and the State explicitly agreed "that no part of any payment . . . is made in settlement of an actual or potential liability for a fine, penalty (civil or criminal) or enhanced damages." App. A-61.

Following settlement of the Tobacco Litigation, the State immediately began touting the windfall that it had received. Press releases compared the money sought ($1.31 billion) with the money paid ($6.17 billion) and bragged that the "settlement is more than 4 1/2 times the amount sought in damages." App. A-88 to A-94.[8] To date, no payments of

[8] The money the State is to receive is divided into two streams of payments. The first stream of payments is paid over five years. The total of this first stream of payments is $1.31 billion–the exact amount of

settlement proceed money have been made to either the Petitioners or any other Minnesota citizen whose medical treatment for smoking-related illnesses was paid for, in whole or in part, through the State's MA and GA programs. Moreover, despite the State's full recovery of all past smoking-related MA and GA medical costs, the State has yet to take any steps to waive, satisfy, or discharge its lien or subrogation interests that arose automatically as a matter of law pursuant to Minnesota Statutes § 256B and 256D.

On July 17, 1998, Petitioners filed a declaratory judgment action against the State of Minnesota seeking a clarification of Petitioners' rights under the MA and GA statutes, including their entitlement to a portion of the settlement proceeds that had been, and would be in perpetuity, collected by the State of Minnesota pursuant to the Tobacco Litigation settlement agreement. App. A-95 to A-106. In their Amended Complaint, with general references to federal law and specific references to state law, Petitioners argued that the State's settlement of Petitioners' medical expense claims against the tobacco defendants necessarily implicated the federal and state statutory schemes entitling Petitioners and all others similarly situated to a portion of the settlement proceeds as mandated by the federal and state Medicaid statutes. App. A-96, A-101 to A-104. In their prayer for relief, Petitioners specifically requested: (1) at least one-third of the net recovery if the State's portion was more than 66 2/3 percent of the amount collected; (2) if the State's full recovery is less than 66 2/3 percent of the net settlement recovery, then the difference between the full recovery and the total amount of the settlement mandated by state and federal law; and (3) a declaration, that the State's subrogation and lien interests in Petitioners and the putative

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money the State's expert testified to at trial as the amount the State had paid in past medical costs.

class members' claims against the tobacco defendants are waived, satisfied, or discharged. App. A-103 to A-105.

The State condemned Petitioner's complaint for declaratory judgment as lacking merit, and argued that it had settled nothing which belonged to Petitioners and all other similarly situated MA or GA recipients. App. A-107 to A-110. In lieu of answering the complaint, the State moved the trial court to dismiss Petitioners' complaint on the ground that it failed to state a claim upon which relief could be granted. App. A-113 to A-143. The Petitioners filed a cross motion for partial summary judgment.[9] In its briefs to the trial court in support of its motion to dismiss, the State repeatedly referenced what it had brought (i.e., a "direct action" against the tobacco defendants), but the State refrained from drawing the court's attention to what it settled (i.e. Petitioners' past and future medical expense claims which Petitioners could have brought against the tobacco defendants on their own behalf prior to the Tobacco Litigation settlement). App. A-125.[10]

In its Memorandum and Opinion dismissing Petitioners' complaint for failing to state a claim, the Hennepin County District Court trial judge devoted the first nine pages to a

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[9] Petitioners explicitly did not bring a motion on the prayer for injunctive relief seeking a declaration that the State's lien and subrogation interests are forever satisfied, waived, or discharged. As of today, no court has ruled upon this aspect of the claim for relief despite the State's admissions that it has settled all past and future medical cost claims. See Note 10, infra.

[10] As will be discussed more fully, infra, the State's position as to what it settled changed at each level of review. During oral argument before the Hennepin County District Court trial judge, the State admitted for the first time that it settled all past medical care cost damages. App. A-112. A year later, in both briefs and argument to the Minnesota Court of Appeals, the State admitted that it also had settled all future medical care cost claims and the Court so found. Brown v. State, 617 N.W.2d 421, 426 (Minn. Ct. App. 2000) petition for rev. denied (2001)

recitation of the various counts contained within the State's complaint in the Tobacco Litigation, and to the various motions brought in that Litigation. App. A-17 to A-25. Despite the importance of determining whether the past and future medical expense damage claims owned by Petitioners' and 70,000 other Minnesota MA and GA recipients were settled and forever discharged by the State in the Tobacco Litigation settlement, without notice and without any compensation whatsoever to the individual recipients themselves, the trial judge only devoted two paragraphs of his Memorandum to an analysis of the Tobacco Litigation settlement agreement – the document pursuant to which all payments are made and releases are granted between the State and the tobacco defendants. App. A-26 to A-27. Notably absent from the Hennepin County District Court trial judge's opinion is any citation to the part of the settlement agreement which describes in clear terms the released and forever discharged claims, or any mention to the State's outright admission to the trial court that it had settled Petitioners' past and future medical damage claims.[11]

Upon Petitioners' appeal of the trial court's dismissal of their complaint for declaratory judgment, the Minnesota Court of Appeals made explicit findings based upon the State's admission of what it had settled:

> [T]he state's settlement precludes individual medical- and general-assistance recipients from pursuing claims for past or future health care costs covered by the state's medical- or general-assistance programs.

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[11] Moreover, contrary to the very purpose of the Declaratory Judgement Act, the trial court failed to provide the parties with an express declaration of their rights, duties, or obligations. This omission was recognized by the Minnesota Court of Appeals. See Brown v. State, 617 N.W.2d at 427. (App. A-12.)

Brown, 617 N.W.2d at 426. App. A-9. Nevertheless, the court below confused the assignment mandated by both federal and state law. The Minnesota Appeal's Court explicitly found that the federal and state statutes "require all recipients of medical assistance to assign to the State any claim they may have against third parties for the medical expenses paid by the State." Id. (emphasis added) (citing 42 U.S.C. § 1396k(a)(1)(A) and Minn. Stat. § 256B.056, subd. 6).[12] However, nowhere in the statutes cited by the Minnesota Appeals Court does it state that the "claim" is assigned. Rather, the statutory language at both the federal and state level states that it is only the "right to payment" that is assigned.

Despite recognizing the State's admission that both past and future medical cost claims had been settled, the Minnesota Court of Appeals never explains who, under either the state or federal statutory framework, is entitled to those future medical payments. Both the federal and state statutory schemes explicitly state that once full recovery for past medical costs has been obtained, all money remaining belongs to the injured recipient.[13]

Petitioners timely filed a petition for further review in the Minnesota Supreme Court. On November 21, 2000,

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[12] The Appeal's Court repeated this error when it stated: "In other words, subsequent to the assignment, the legal right to recover the medical expenses paid by the State from third parties belong solely to the State." Brown, 617 N.W.2d at 426 (emphasis added) (App. A-10).

[13] Accordingly, the Minnesota Court of Appeals ruling still leaves unanswered the following questions: (1) what represents full recovery to the State for past medical expenses to treat smoking-related illnesses? (2) what amount has been or will be recovered by the State pursuant to its settlement agreement with the tobacco defendants? and (3) if the State recovered more by way of settlement than its past medical costs, what portion of the excess is attributable to the Petitioners' and putative class members' future medical costs?

Petitioners' request before the Minnesota Supreme Court was denied. The federal statutory scheme which, at a minimum, provides the limits to the powers of the State in administering its Medicaid programs, was referenced and argued in Petitioners' Amended Complaint, briefing before the Hennepin County District trial court, and the Minnesota Court of Appeals. Until the State's admission related to future damages, and the Minnesota Court of Appeals' adoption of that admission, the constitutional issues were neither framed nor argued.

In their appeal to the Minnesota Court of Appeals, the Petitioners were arguing that their declaratory judgment complaint stated a claim upon which relief could be granted.[14] The Minnesota Court of Appeals for the first time in its opinion, as is its right, made the declaration of the rights, duties and obligations of the parties in a way that implicates constitutional issues. Petitioners now seek review of this Court to address the constitutional issues that are raised by the Appeals Court's declaration.

REASONS FOR GRANTING THE PETITION

At the time Petitioners were first injured by the tobacco companies, a property interest owned solely by the Petitioners arose in the cause of action. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982); Pritchard v. Norton, 106 U.S. 124, 132 (1882). Unable to pay for the medical costs to treat their medical-related illnesses, Petitioners entered into a

[14] The Minnesota court's holding that plaintiffs' Complaint failed to state a claim parallels a case which will be heard by this Court. See Great West Life & Annuity Ins. Co., et al. v. Janette Knudson, No. 99-1786. In Knudson, it is the employer in a private contract that is arguing that it has a claim to funds recovered by an injured party against a liable third party. This Petition is the mirror image–in the public context it is the injured party arguing that it has a claim to funds recovered by the State against a liable third party.

contract of assignment with the State thereby creating the right of the State to a lien and subrogation interest in the right to payment for past medical costs only. Petitioners have a property interest in both their contract of assignment with the State and the applicable limits to the State's powers as set forth in the state and federal Medicaid statutes. See Perry v. Sindermann, 408 U.S. 593, 601 (1972) (a contract with the State can create a constitutionally protected property interest); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (the receipt of public assistance benefits can create a constitutionally-protected property interest). If, as the Minnesota Court of Appeals has found, the State has settled Petitioners' and putative class members' future damages claims, then the limits set by the federal Medicaid Act have been exceeded and compensation is due these individuals. If the Minnesota Court of Appeals ruling is allowed to stand, states would be permitted to bring a claim against third-party tortfeasors by defining it as a "direct" action. This "direct" action could then be unilaterally settled without notice to or participation by the medical assistance recipient whose injury prompted the lawsuit, and without regard to the mandate set forth in the Federal Medicaid Act that once full recovery has been received, the remainder shall be paid to the injured recipient.

Moreover, the Minnesota Court of Appeals opinion is in conflict with opinions rendered in other courts across the country. The United States Court of Appeals for the Seventh Circuit, in an action prosecuted by a Medicaid recipient against the State seeking tobacco settlement proceeds, found that the settlement agreement between the State and the tobacco defendants could only be interpreted with regard to what was assigned by the Medicaid recipient to the State – not by what was brought. Floyd v. Thompson, 227 F.3d 1029, 1037 (7th Cir. 2000).

A California Appellate Court, on the other hand, has ruled that the settlement agreement is only interpreted in light of the type of claim prosecuted by the State. See State of

California v. Superior Court, 83 Cal. App. 4th 597, 602, 99 Cal. Rptr. 2d 735, 738 (2000). The varied and conflicting reasoning employed by the Seventh Circuit, the Minnesota courts and the California court, will have an impact on the approximately 20 lawsuits similar in nature to the instant action that have been or are being prosecuted in the United States. Substantial and important constitutional issues are raised in these cases, including: (1) whether the settlement payments received by a State from the tobacco companies are to be analyzed with respect to the action prosecuted or by the terms of the settlement agreement pursuant to which the payments are made; (2) whether the Federal Medicaid Statute effectuates an assignment of a "claim" or the "right to payment"; (3) where a State's settlement against a liable third party results in full recovery for past medical costs and recovery for future medical costs, whether the federal Medicaid statutes, without regard to what is assigned, require that the future medical care costs be returned to the injured Medicaid recipient; and (4) when the State settles a claim jointly owned with a Medicaid recipient, is it required to waive, release, or satisfy its lien and subrogation interests.

The opinions below, and in other courts throughout the country, have created conflicting standards and, in some instances, abrogate the constitutional rights of the most needy citizens in this country. Having a constitutionally-recognized property right in their claims, the Medicaid recipients traded the right to payment in all of their claims in exchange for the payment of their health care costs. At least in the State of Minnesota, the State's settlement with the tobacco companies completely paid for this bargain (i.e., the State was fully reimbursed for the past medical care cost to treat the smoking-related illnesses). The State, by virtue of settling future medical care cost claims and not sharing any of the proceeds with the injured recipients, has now trampled upon the rights of the Medicaid recipients by taking future medical care costs--something that was not contemplated by the

contract of assignment or the State or federal statutory schemes, and is violative of Petitioners' Fourteenth Amendment due process rights and Petitioners' Fifth Amendment taking rights.

I. THERE HAS BEEN AN IMPERMISSIBLE TAKING OF PROPERTY WITHOUT JUST COMPENSATION WHEN THE STATE OF MINNESOTA UNILATERALLY SETTLED FUTURE DAMAGES CLAIMS BELONGING TO MEDICAID RECIPIENTS WITHOUT NOTICE OR OPPORTUNITY TO BE HEARD AND WHEN IT RETAINED THE SETTLEMENT PROCEEDS IN DEROGATION OF FEDERAL AND STATE STATUTES.

The Taking Clause of the Fifth Amendment to the Constitution provides that private property may not be taken for public use without just compensation. Central to the inquiry here is: (1) did Petitioners have a property interest? and (2) if so, did a taking occur? Petitioners had a property interest in their causes of action as well as in the contract of assignment mandated by the Medicaid statutes pursuant to which benefits were granted. A taking did occur in this case since, contrary to the Medicaid statutes, future medical damages claims were settled by the State and the money is now being collected by the State without any compensation to the Petitioners and others similarly situated.

A. Petitioners Had A Property Interest In Their Causes Of Action, In the Contract of Assignment With The State, And In the Administration Of Medicaid Benefits As Set Forth By Statute

In the early years of this Court's jurisprudence, property interests were usually viewed in terms of land and chattels.

See, e.g., Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 179-80 (1871). In the 20th Century, this Court broadened the definition of "property" to include intangible property interests "created and their dimensions...defined by existing rules or understandings that stem from an independent source such as state law." Webb's Fab. Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980) (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)). Petitioners' property interests at issue here are created by common law, contract, and statute.

At the time of injury, Petitioners had a property interest in their cause of action against the tobacco defendants. This Court has held that a "vested right of action is property in the same sense in which tangible things are property..." Pritchard, 106 U.S. at 132. Over the course of the past fifty years, the property interest in a cause of action has been reaffirmed by this Court. See Logan at 428 (1982); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

The nature of Petitioners' property interest was altered at the time that medical services to treat smoking-related illnesses became necessary and Petitioners lacked the financial means to pay for such medical treatment. At that point in time, pursuant to both federal and state statute, Petitioners assigned their right to payment for money collected by way of settlement or judgment in their entire cause of action, or any part of it, in exchange for receiving medical assistance paid for by the State's MA and GA programs. Contrary to the finding of the Minnesota Court of Appeals, this assignment did not divest Petitioners of their cause of action or of their interests in any damages obtained by the State's prosecution of an action against the tobacco companies. Instead, in addition to maintaining a property interest in the cause of action, two new property interests were created.

The first new property interest arose when the contract of assignment was entered into between the Petitioners and the State. A contract with the State can create a constitutionally protected property interest. See Perry, 408 U.S. at 601. The contract of assignment here was limited to the State's recoupment of past medical expenses paid up to the point of judgment or settlement.

The second new property interest owned by Petitioners arose as a result of Petitioners' acceptance into the MA or GA programs. This Court has repeatedly recognized a constitutionally-protected property interest in welfare benefits. See Goldberg v. Kelly, 397 U.S. 254, 262 (1970). The Petitioners' rights and expectations were shaped and defined by both federal and state Medicaid statutes.

As set forth in the state and federal Medicaid statutes, Petitioners' property interests in their causes of action, their contracts with the State, and their Medicaid benefits coalesced around a single principle defined over and over again in the state and federal Medicaid statutes–once the State had obtained full recovery for past medical costs, the balance of any recovery must be paid to the injured recipient. Each and every statute states this principle in mandatory terms. See 42 U.S.C. § 1396k(b) and 42 C.F.R. § 433.154(c). State officials administering the program or attorneys prosecuting claims on behalf of injured recipients or the State have no discretion. The formula provides a bright line that is applicable in each and every situation regardless of what is assigned or who prosecutes the action.

The Minnesota Court of Appeals recognized the Petitioners' right in their cause of action prior to the assignment. However, the Minnesota Court of Appeals confused the nature of the property rights following the assignment and determination of eligibility for the MA and GA programs. The Minnesota Court of Appeals, interpreting Minnesota law, incorrectly stated that the assignment was of the entire cause of action, not just the right to payment to

secure the lien and subrogation interests the state enjoyed in the injured recipients' causes of action for recovery of money damages.

The truth of this statement is proven by the Minnesota Court of Appeals' opinion. First, it would be impossible for the State to settle future medical damage claims if it did not jointly own the entire cause of action with the injured recipient since, according to both federal and state Medicaid law, the right to payment for future damages claims is owned by the injured recipient. Second, when the Court below interpreted the Minnesota state statutory guaranty of not less than one-third of the net recovery to be afforded to the injured recipient as being limited to instances where the injured recipient is acting as a plaintiff, the Minnesota Court of Appeals never explained how an injured recipient could ever prosecute a claim if, as a condition of receiving MA and GA benefits, an assignment of the entire cause of action took place.

As set forth in this Court's prior precedent, Petitioners enjoy property interests in their causes of action, in their contract of assignment with the State, and in their Medicaid benefits. This property interest has not been acknowledged by the State, the trial court, or the Minnesota Court of Appeals.

B. Petitioners' Property Was Taken For Public Use Without Compensation

Both Petitioners and the State agree on two key points: (1) prior to the receipt of MA and GA benefits, the Petitioners had a cause of action against the tobacco companies; and (2) by virtue of payment of all or part of Petitioners' medical cost to treat smoking-related illnesses, the State of Minnesota obtained a property interest in Petitioners' right to payment from the tobacco companies. Beyond these two points, however, there is no agreement.

The State argued, and the Minnesota Court of Appeals found, that nothing was taken from Petitioners because the State prosecuted a "direct" action.[15] Regardless of the nomenclature, the State settled the Petitioners' right to prosecute and keep for themselves an amount money equal to the future costs of treating their smoking-related illnesses. Counsel is unaware of any case from this Court or any other court across the country that construes a settlement agreement purporting to settle all claims "known or unknown, brought or unbrought, accrued or unaccrued, whether direct, indirect, or derivative" to be limited to what was actually prosecuted. The Minnesota Court of Appeals' finding to the contrary undermines the finality of all settlement agreements that contractually settle more than what was formally brought in the underlying claim or action.

The State also argued, and the Minnesota Court of Appeals alternatively found, that as a result of the Medicaid assignment, Petitioners never had a right to their past or future medical cost claims and, accordingly, there was no "taking." See Brown, 617 N.W.2d at 426-27. (App. A-9 to A-12.) Such reasoning is contrary to the federal Medicaid statues, the State MA and GA statutes, and the common sense reasoning utilized by the Seventh Circuit Court of Appeals. Each and every statute speaks only to the recovery of past Medicaid costs. Whether the case is prosecuted by the individual or the State, this maxim still applies. To rule otherwise would render both the federal and state statutory limits and distribution formulae meaningless. Moreover, such a holding would wipe the books clean of the federal statutes that provide for future medical trusts funded by settlements

[15] The Minnesota court's opinion never addresses the fact that the State, having identified a liable third-party, had an absolute duty under federal law to collect the Medicaid benefits paid. See 42 U.S.C. § 1396a(a)(25)(B) and 42 C.F.R. § 433.138(d).

and judgments against liable third parties. See 42 U.S.C. § 1396p(d)(4)(a).[16]

As a matter of logic, the Seventh Circuit Court of Appeals has analyzed the problem in terms of state power. See Floyd, 227 F.3d at 1036-38. In Floyd, the State of Wisconsin only was assigned the right to receive past medical costs. Id. at 1037. By the terms of the settlement agreement between the State of Wisconsin and the tobacco defendants, similar in all relevant respects to the settlement agreement between Minnesota and the tobacco defendants, the State of Wisconsin only settled what it could have brought leaving the rest of the recipients' claims intact. Id. The Seventh Circuit found that since Wisconsin did not have any right or entitlement by the contract of assignment or state statute to future medical costs, it, as a matter of logic, could not settle future medical cost claims even when it purported to settle everything it could have brought. Id. Accordingly, all money in excess of past medical damages secured by the State must have been paid as compensation for release of the State's direct action claims. Id.[17]

In stark contrast to the Wisconsin statute, the State of Minnesota is liened to and subrogated in all causes of action, or any part thereto. As the State admits, and the Minnesota Court of Appeals found, the State of Minnesota actually did settle future damages claims. See Brown, 617 N.W.2d at 426 (App. A-9). Utilizing the logic and precedent of the Seventh Circuit, it necessarily follows that something of value was

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[16] In 1993, Congress amended 42 U.S.C. § 1396p as part of the Omnibus Budget Reconciliation Act of 1993. The amendments allow for the creation of a special needs trust, the assets in which will not disqualify the disabled individual from receiving Medicaid benefits so long as the trust contains a pay-back provision after the recipient's death.

[17] The Seventh Circuit went so far as to suggest that the tobacco companies may not have settled the Medicaid recipients' future damages claims in Wisconsin. See Floyd, 227 F.3d at 1037.

taken by the State of Minnesota and not paid to Petitioners and other injured medical assistance recipients. In short, there has been a taking for public use without just compensation.

II. DUE PROCESS IS VIOLATED WHEN A STATE UNILATERALLY SETTLES FUTURE DAMAGES CLAIMS BELONGING TO MEDICAID RECIPIENTS WITHOUT NOTICE OR OPPORTUNITY TO BE HEARD AND WHEN IT RETAINS THE SETTLEMENT PROCEEDS IN DEROGATION OF FEDERAL AND STATE STATUTES.

The Fifth Amendment to the Constitution is made applicable to the states through the Fourteenth Amendment to the U.S. Constitution. The Minnesota Court of Appeals' finding as to the scope of the Tobacco Litigation settlement demonstrates that due process was not afforded Petitioners and others similarly situated.

As is set forth in Section I, supra, Petitioners owned a constitutionally-protected property interest. The question then becomes what process was due before the government settled and took for itself the right to payment for the Petitioners' future medical costs, not yet incurred much less paid for by the State.

As a general rule, the due process clause requires that individuals receive notice and a meaningful opportunity to be heard before the government deprives them of property. See United States v. James Daniel Good Real Prop., 510 U.S. 43, 48 (1993). Even in an extraordinary situations, the notice and meaningful opportunity to be heard must take place immediately after the initial deprivation. See Federal Deposit Ins. Corp. v. Mallen, 486 U.S. 230, 240 (1988); Board of Regents, 408 U.S. at 570, n. 7. Here, according to the State's own arguments, for years it publicized that it was prosecuting

a "direct" action that would be of no consequence to Petitioners or other MA and GA program participants who suffer from smoking-related illnesses. At the point of settlement, however, the State decided to settle more than what it actually brought. Without notice or opportunity to be heard, Petitioners and others similarly situated suddenly lost their right to prosecute and keep for themselves future medical expenses. Given the size of the potential claims and dependent upon the method by which the money was secured, if this money found its way into Petitioners' and others' hands, the asset could be large enough so that they would no longer be on public assistance (and there would be no future damages paid by the State) or a medical spending trust could be established (and the State would be reimbursed for any expenses actually incurred).

Post-settlement, and through the initial filing of the Complaint in this action, the State never provided any opportunity for the injured recipients to be heard and affirmatively stated that nothing had been settled. It is only through the course of this litigation that the State has been forced to admit that it settled both past and future medical cost claims.

The Petitioners and others similarly situated have suffered a defined and valuable loss. Petitioners and other similarly situated are prejudiced in that they may never prosecute a claim against the tobacco defendants and keep for themselves amounts equal to the future medical costs to treat smoking-related disease.

Specific and substantive limits have been placed on the State's official discretion by virtue of both the federal Medicaid scheme and the State's own MA and GA statutes. See Olim v. Wakinekona, 461 U.S. 238, 249 (1983). If these limits are going to be surpassed, then the recipient should be given notice and a meaningful opportunity to be heard. The Minnesota Court of Appeals, confused by the State's arguments and the nature of the assignment effectuated here,

has once again deprived Petitioners and others similarly situated of such a hearing.

CONCLUSION

The State of Minnesota, along with the 49 other states, have rightfully labeled their actions against the tobacco industry as historic. The ramifications of the State's settlement with the tobacco defendants is equally historic. Counsel representing Medicaid recipients across the country are questioning the scope of a Medicaid assistance recipient's assignment, the terms of what was settled between the states and the tobacco defendants, and what, if anything, the Medicaid recipients are entitled to by virtue of the settlement.

Specific to the case at bar, neither the State, the trial court, nor the Minnesota Court of Appeals has answered basic questions, equally historic in their significance: (1) what represents full recovery to the State for past medical costs to treat smoking-related illnesses? (2) what, if anything, over and above that amount was collected by the State? and (3) what, if anything, of the excess must be returned to the Medicaid recipients pursuant to federal and state statute?

Guidance from this Court is necessary to confirm that even the neediest of our country's citizens have property interests in their causes of action, their contracts of assignment with the states and the Medicaid benefits as defined by federal and state statutes. The value of these rights have been graphically illustrated by the historic and unprecedented value of the settlement the State secured from the tobacco defendants. The core of the State of Minnesota's claim, along with the claims of many other states, was that the injured smokers were deceived, manipulated, and, ultimately, addicted necessitating payments from the State to treat smoking-related illnesses. Without intervention of this Court, these same individuals whom the State proved were hopelessly addicted to tobacco must now continue by virtue

of their addiction to pay state taxes on each pack of cigarettes purchased (ostensibly to pay for medical costs) and now pay for the tobacco companies settlement with the States (none of which inures to the benefit of Petitioners or others similarly situated). Similarly, without any declaration that the State's lien and subrogation interests are waived, satisfied, or discharged, Petitioners may have to pay a third time from any proceeds they may recover from prosecution of their remaining claims against the tobacco defendants.

Intervention by this Court will clarify the conflicts that have arisen between the various jurisdictions considering the scope of the State's settlement agreements in the tobacco litigation, will clarify the federal Medicaid scheme and its limits, and provide Petitioners and others similarly situated with a declaration of the integrity of their cause of action when the injuries result in permanent and on-going injury, the treatment for which has been paid by the State in the past.

Dated: February 20, 2001

Respectfully submitted,

Anthony J. Nemo
Counsel of Record
Ronald I. Meshbesher
MESHBESHER & SPENCE, LTD.
1616 Park Avenue South
Minneapolis, MN 55404
(612) 339-9121

Hugh V. Plunkett III
Robert K. Shelquist)
LOCKRIDGE GRINDAL NAUN
P.L.L.P.
100 Washington Avenue South,
Suite 2200
Minneapolis, MN 55401-2179
(612) 339-6900

John A. Cochrane
COCHRANE & BRESNAHAN
24 East Fourth Street
St. Paul, MN 55101
(612) 298-1950

Attorneys for Petitioners

STATE OF MINNESOTA

IN SUPREME COURT

C6-00-587

Jesse Lee Brown and Ronald J. Bergeron
on behalf of themselves and all others
similarly situated, et al.,

Petitioners,

vs.

State of Minnesota,

Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Jesse Lee Brown and Ronald J. Bergeron for further review be, and the same is, denied.

Dated: November 21, 2000

BY THE COURT:

s/
Kathleen A. Blatz
Chief Justice

PAGE, GILBERT, J.J., took no part in the consideration or decision of this case.

STATE OF MINNESOTA
IN COURT OF APPEALS
C6-00-587

Jesse Lee Brown and Ronald J. Bergeron
on behalf of themselves and all others
similarly situated, et al.,
Appellants,

vs.

The State of Minnesota,
Respondent.

Filed September 19, 2000
Affirmed in part and reversed in part
Halbrooks, Judge

Hennepin County District Court
File No. 98-11152

John A. Cochrane, Cochrane & Bresnahan, 24 East 4th Street, St. Paul, MN 55101; and

Hugh V. Plunkett, III, Robert K. Shelquist, Plunkett, Schwartz, Peterson, P.A., 102nd Street NE, Suite 114, Minneapolis, MN 55413; and

Ronald I. Meshbesher, Anthony J. Nemo, Meshbesher & Spence, Ltd., 1616 Park Avenue South, Minneapolis, MN 55404 (for appellants)

Mike Hatch, Attorney General, Patricia A. Sonnenberg, Assistant Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Michael V. Ciresi, Roberta B. Walburn, Gary L. Wilson, Robins, Kaplan, Miller & Ciresi, L.L.P., 2800 LaSalle Plaza, 800 LaSalle Avenue, Minneapolis, MN 55402-2015 (for respondent)

Considered and decided by Randall, Presiding Judge, Harten, Judge, and Halbrooks, Judge.

SYLLABUS

1. It is not reversible error if the district court fails to make an express declaration of the parties' rights in a declaratory judgment action so long as the order or judgment adjudicating the dispute has the effect of declaring the parties' respective rights.

2. The recovery-allocation formulae in Minn. Stat. §§ 256B.042, subd. 5; 256B.37, subd. 4; and 256D.03, subd. 8(f) (1998), do not provide appellants a basis for obtaining a portion of the State of Minnesota's multi-billion dollar settlement with various entities involved in the manufacture and marketing of cigarettes.

3. The district court abuses its discretion when it imposes sanctions against attorneys who bring good faith claims that are arguably legitimate.

OPINION

HALBROOKS, Judge

Appellants challenge the district court's granting of respondent's motion to dismiss their declaratory judgment class action for failure to state a claim. They also challenge the district court's imposition of sanctions in this case. Because the district court did not err in dismissing the action

but did abuse its discretion in imposing sanctions, we affirm the dismissal and reverse the imposition of sanctions.

FACTS

This litigation arises in the aftermath of the State of Minnesota's ("state") multibillion-dollar settlement of its claims against multiple entities involved in the manufacturing and marketing of cigarettes ("tobacco defendants"). The state asserted several causes of action against the tobacco defendants including various antitrust and consumer fraud claims. The state and the tobacco defendants settled the case on May 18, 1998, after all of the evidence had been introduced at trial but before the case went to the jury. As a result of the settlement, the tobacco defendants agreed to pay the state approximately $6.17 billion. The tobacco defendants agreed to pay $1.31 billion in periodic payments between September 1998 and January 2003, as well as an estimated $4.8 billion in future payments.

On July 17, 1998, appellants filed a class-action lawsuit in Hennepin County District Court seeking a declaratory judgment and a portion of the settlement proceeds. The putative class representatives represent approximately 70,000 Minnesota residents who allege to have suffered smoking-related illnesses for which the state paid medical expenses under the state's medical-assistance and general-assistance programs. Appellants contend that, although they did not pay for the medical expenses they incurred, the medical-assistance and general-assistance statutes provide that any third-party liability claim is "shared" or jointly owned by appellants and the state. Both parties agree that the settlement precludes individual medical-assistance and general-assistance recipients from asserting claims against the tobacco defendants for state-paid medical expenses. Appellants contend, however, that they are entitled to a share of the settlement proceeds obtained by the state. This claim is based

on the fact that the medical-assistance and general-assistance statutes contain formulae to be used to allocate recoveries from third parties between the state and individual recipients for claims brought pursuant to those statutes.

The state filed a motion to dismiss appellants' complaint for failure to state a claim upon which relief could be granted and a motion for sanctions. Appellants opposed these motions and filed a motion for partial summary judgment. The district court heard arguments on all of the motions and filed an order granting the state's motion to dismiss appellants' complaint, granting the state's motion for sanctions, and denying appellants' motion for partial summary judgment. But the district court requested that the parties provide additional submissions on the issue of sanctions and held a second hearing on that issue. On August 17, 1999, the district court reaffirmed its decision to impose sanctions and ordered each of the three law firms involved in the litigation to pay $5,000 to the state. This appeal follows.

ISSUES

1. Does appellants' complaint set forth a legally sufficient claim for relief?

2. Did the district court abuse its discretion when it imposed sanctions against appellants' attorneys?

ANALYSIS

1. Motion to dismiss

When reviewing a dismissal for failure to state a claim on which relief can be granted, an appellate court must only determine whether the complaint sets forth a legally sufficient claim for relief. *Geldert v. American Nat'l Bank*, 506 N.W.2d 22, 25 (Minn. App. 1993), *review denied* (Minn. Nov. 16,

1993). It is immaterial whether the plaintiff can prove the facts alleged in the complaint. *Juster Steel v. Carlson Cos.*, 366 N.W.2d 616, 619 (Minn. App. 1985). A complaint should only be dismissed for failure to state a claim if it appears to a certainty that no facts consistent with the pleading exist that support granting the relief demanded. *Brakke v. Hilgers,* 374 N.W.2d 553, 555 (Minn. App. 1985). Although the district court typically may not consider documents other than the complaint without converting the motion into one for summary judgment, an exception to this rule exists if the complaint refers to a document and the document is central to the claims alleged. *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995).

In this case, the district court did rely on one or more documents that were filed in connection with the tobacco litigation. The documents, prepared by respondent in the tobacco litigation, were referenced in appellants' complaint. The district court appropriately relied on the documents in addition to the complaint and appellants do not challenge the court's consideration of these documents.

A. Express declaration of rights

Appellants contend that the district court's decision to analyze this case through the lens of a motion to dismiss created a procedural defect requiring reversal. Appellants' complaint seeks a declaratory judgment pursuant to Minnesota's version of the Uniform Declaratory Judgments Act. Minn. Stat. §§ 555.01-.16 (1998). Appellants contend that they are entitled to an actual declaration of the respective rights of the putative class members and the state and that any right to actually receive a portion of the settlement proceeds is collateral to the declaratory judgment. *See* Minn. Stat. § 555.01 (providing that the court's declaration may be either affirmative or negative in form and effect). The question,

therefore, is whether the district court's dismissal of appellants' complaint based on the ultimate relief sought, i.e., a portion of the tobacco settlement, operates as a declaration of their rights.

This alleged procedural defect is similar to one of the issues addressed in *Ketterer v. Independent Sch. Dist. No. 1*, 248 Minn. 212, 79 N.W.2d 428 (1956). In *Ketterer*, the appellant argued "that the court abused its discretion in dismissing the action instead of making a declaration in his favor or any declaration at all." *Id.* at 227, 79 N.W.2d at 439. The supreme court, however, held that:

> The judgment dismissed the plaintiff's complaint. Plaintiff argues that the judgment is defective in that it did not declare the rights of the parties. The judgment in better form should have declared the rights of the parties in conformity with findings and conclusions of law. The declaration may be either affirmative or negative in form and effect. However, since the court's findings of fact, conclusions of law, and order for judgment resulting in a dismissal herein operates as an adjudication upon the merits, the failure to declare the rights of the parties on the state of the record in this case is, we think, here without prejudice and not reversible error.

Id. at 228-29, 79 N.W.2d at 440 (citations omitted).

Like *Ketterer*, the district court in this case did not expressly declare the respective rights of the parties, but its findings, conclusions, and order do operate as an adjudication of the merits. While an express declaration of the parties' rights may have been preferable, the district court effectively declared that the appellants have no right to any portion of the tobacco settlement by operation of the medical- and general-assistance statutes discussed below.

B. Allocation formulae

"[S]ome recovery theory must underlie a declaratory judgment demand." *Vrieze v. New Century Homes, Inc.*, 542 N.W.2d 62, 67 (Minn. App. 1996). In this case, appellants' two-count complaint asserts statutory claims under the Minnesota medical-assistance and general-assistance programs as the basis for recovery. *See* Minn. Stat. §§ 256B.042, subd. 5; 256B.37, subd. 4; 256D.03, subd. 8(f) (1998). Contrary to the appellants' repeated assertions, however, the state did not proceed in the tobacco litigation in a representative capacity or assert claims that were derivative to those of the medical- and general-assistance recipients. Rather, the state brought a direct action against the tobacco defendants for the damages sustained by the state. Those claims did not implicate the medical- and general-assistance statutes. In other words, the state's lawsuit was outside the scope of these statutes. For this reason alone, we could affirm the district court dismissal.

Nonetheless, a fair reading of the settlement agreement does give some weight to the appellants' arguments. The settlement agreement releases the tobacco defendants from liability for state-paid medical expenses, i.e., expenses paid by the medical- and general-assistance programs. Therefore, although the state's complaint in the tobacco litigation did not seek damages pursuant to these statutes, any claim the state may have had for these damages was settled at the conclusion of the litigation. *See* Minn. Stat. §§ 256B.042, subd. 3 (authorizing the state to take actions to enforce its medical-assistance lien or pursue an independent action against a third party "that may be liable" to the recipient); 256B.37, subd. 2 (authorizing the state to join or institute a civil action to enforce its medical-assistance subrogation rights); 256D.03, subd. 8(d) (authorizing state to institute or join a civil action to enforce its general-assistance subrogation rights). But even

if the pleadings in the tobacco litigation and the instant case did not support the district court's dismissal, the medical- and general-assistance statutes do not provide an avenue for the appellants to obtain a portion of the state's settlement.

This court interprets statutes de novo, and we need not defer to the district court's interpretation. *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 190 (Minn. 1990). The three statutes at issue in this case contain nearly identical language and provide formulae for allocating recoveries obtained from third parties who are liable for medical- and general-assistance expenses paid by the state. Under each of these statutes, attorney fees and costs incurred by the party who obtained the recovery are paid first. Minn. Stat. §§ 256B.042, subd. 5; 256B.37, subd. 4; 256D.03, subd. 8(f). Next, the state is reimbursed to the extent of its expenditures on behalf of the medical- or general-assistance recipient out of the remaining proceeds. Minn. Stat. §§ 256B.042, subd. 5; 256B.37, subd. 4; 256D.03, subd. 8(f). Finally, the recipient is entitled to retain any recovery in excess of the state's expenditures or, at a minimum, one-third of the recovery. Minn. Stat. §§ 256B.042, subd. 5; 256B.37, subd. 4; 256D.03, subd. 8(f).

Both parties agree on several important facts. First, the state's settlement precludes individual medical- and general-assistance recipients from pursuing claims for past or future health care costs covered by the state's medical- or general-assistance programs. Second, the state's settlement does not preclude individual medical- or general-assistance recipients from pursuing claims against the tobacco defendants for other damages, e.g., pain and suffering or lost wages. Finally, had the state not brought its suit and had the putative class members made recoveries from the tobacco defendants on their own, the class members would have been entitled to at least one-third of the recovery after attorney fees and costs were paid.

The central issue in this case is whether any portion of the state's recovery is subject to distribution to individual smokers pursuant to the allocation formulae contained in the medical- and general-assistance statutes. The district court concluded that the statutes do not provide a basis for the putative class to proceed with its claim. We agree.

Minnesota, as mandated by the federal Medicare act, requires all recipients of medical assistance to assign to the state any claim they may have against third parties for the medical expenses paid by the state. 42 U.S.C. §1396k(a)(1)(A); Minn. Stat. § 256B.056, subd. 6. General-assistance recipients are required to make a similar assignment. Minn. Stat. § 256D.03, subd. 3a. In other words, subsequent to the assignment, the legal right to recover the medical expenses paid by the state from third parties belonged solely to the state.

Appellants contend that as a result of the tobacco settlement the state divested them of a right to pursue the tobacco defendants for past and future medical expense. But they currently have the same rights they had prior to the tobacco settlement. They have a right to bring a claim for damages against the tobacco defendants, but they do not have a right to retain the damages representing the state-paid medical expenses. They relinquished their interest in those expenses when they made the assignment to the state. As a result of the assignment, it is clear that the recovery-allocation statutes do not provide appellants with a basis for obtaining a portion of the state's tobacco settlement.

The three statutes at issue in this case all provide that the state is to be fully reimbursed for the payments it made on behalf of the individual recipients. The medical-assistance statutes provide that "[t]he full amount of medical assistance paid to or on behalf of the person as a result of the injury must be * * * paid to the state" before the individual retains any of the recovery. Minn. Stat. §§ 256B.042, subd. 5; 256B.37,

subd. 4. The general-assistance statute contains nearly identical language. Minn. Stat. § 256D.03, subd. 8(f).

Nonetheless, there are instances when the state will not be fully reimbursed. For example, if the net recovery, i.e., the recovery less attorney fees and costs, is less than the payments made by the state, the state will not recoup all of its payments. Also, if reimbursing the state in full would result in the individual recipient receiving less than one-third of the net recovery, the state's reimbursement is limited.

The provision in each of these three statutes allowing a minimum of one-third recovery by the individual recipient who pursues a liable third party serves two purposes. First, it provides that individual recipient with an incentive to pursue a claim. If the individual recipient pursues the liable third party, the state need not expend its limited resources in an effort to recoup its payments. Second, allowing the individual recipient to retain a portion of any recovery made by that individual is recognition that the individual will typically have claims against the third party for more than just medical expenses. For example, the individual will likely have a claim for pain and suffering and possibly one for lost wages or earning capacity. The state is entitled to the first dollar of any recovery regardless of how that recovery is classified by the parties. *See State, Dept of Human Servs. v. Bengston,* 506 N.W.2d 38, 39-40 (Minn. App. 1993) (providing that state may satisfy its interest out of recipient's settlement regardless of how that settlement is characterized by the recipient), *review denied* (Minn. Nov. 16, 1993). But the legislature has made a policy decision that the individual recipient should be permitted to retain a portion of any recovery that he or she successfully pursues. In this case, appellants did not pursue the tobacco defendants and have not lost their causes of action for their own alleged injuries.

Based on our interpretation of the recovery-allocation statutes, we agree with the district court's dismissal of appellants' complaint. These statutes do not provide a basis

for appellants to obtain a portion of the state's tobacco settlement. Although the district court should have provided the parties with an express declaration of their rights, its findings, conclusions and order have this effect. The recovery-allocation statutes relied on by appellants do not confer on them any rights that would allow them to obtain a portion of the state's tobacco settlement. Appellants' complaint does not set forth a legally sufficient claim for relief and it was not error for the district court to order the dismissal:

2. Sanctions

Appellate courts will not disturb a district court's decision to impose sanctions under Minn. R. Civ. P. 11 unless the district court abused its discretion. *Uselman v. Uselman*, 464 N.W.2d 130, 145 (Minn. 1990). "But courts should construe rule 11 somewhat narrowly to avoid deterring legitimate or arguably legitimate claims." *Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143, 150 (Minn. App. 1999) (citing *Uselman, 464* N.W.2d at 142), *review denied* (Minn. Mar. 14, 2000).

In this case,, the district court imposed $5,000 in sanctions against each of the three law firms representing the putative class. The district court identified as its bases for imposing the sanctions that the premise of appellants' lawsuit was "monumentally" wrong and there was not a "shred of evidence to support bringing it." It also indicated at the hearing that it hoped to deter additional attempts by others to obtain a portion of the settlement. Contrary to the district court's position, we do not conclude that appellants' lawsuit was completely frivolous. The recovery-allocation statutes are not absolutely clear and there are no Minnesota cases establishing that these statutes bar medical- and general-

assistance recipients from pursuing a portion of the state's recovery.[1]

Appellants' lawsuit did not lack all objective reasonableness. Although the district court correctly determined that appellants did not state a claim upon which relief could be granted, we conclude that appellants' novel claims were brought in good faith. *See* Minn. R. Civ. P. 11 (providing that parties are permitted to submit pleadings that contain good faith arguments for the extension or modification of existing law). The state would not have incurred the medical- and general-assistance expenses for smoking illnesses without the members of the putative class. Further, the medical- and general-assistance statutes do provide for an allocation between the recipient and the state in at least some situations where a recovery is made from a third party. In light of this, we hold that the district court abused its discretion in sanctioning appellants' attorneys.

DECISION

The state's settlement in the tobacco litigation is not subject to the recovery-allocation formulae contained in Minn. Stat. §§ 256B.042, subd. 5 (1998); 256B.37, subd. 4 (1998); and 256D.03, subd. 8(f) (1998). The district court's dismissal of appellants' class-action lawsuit was appropriate, but the district court's imposition of sanctions against appellants in this case was an abuse of discretion. Appellants did not ultimately prevail on their claim, but it cannot be said

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[1] Subsequent to oral argument on this matter, respondent's counsel provided the court and appellants' counsel with a copy of *State of California v. Superior Court*, 2000 WL 1231390, an August 31, 2000 decision from the California Court of Appeals. While the California court's opinion comments specifically on the Minnesota district court's order in this case and reaches the same result we do, the California court's decision is not dispositive and does not serve as a basis for our decision.

that they failed to assert claims that were, at a minimum, arguably legitimate at the time they were made.

Affirmed in part and reversed in part.

s/ Jill Flaskamp Halbrooks
September 13, 2000

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Jesse Lee Brown and Ronald J. Bergeron,	ORDER:
on behalf of themselves and all others similarly situated,	GRANTING DEFENDANT'S MOTION TO DISMISS; GRANTING DEFENDANT'S MOTION FOR SANCTIONS; DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT; DENYING PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT.
Plaintiffs,	
v.	
The State of Minnesota,	
Defendant.	
	File No. 98-11152

The above-entitled matter came on for hearing before the undersigned judge of district court on the 16th day of September 1998, pursuant to defendant's motion to dismiss, defendant's motion for sanctions, plaintiffs' motion for partial summary judgment and plaintiffs' motion for declaratory judgment.

Ronald I. Meshbesher, Esq., Anthony J. Nemo, Esq., Hugh V. Plunkett, Esq., John A. Cochrane, Esq., and Robert K. Shelquist, Esq., appeared on behalf of plaintiffs; Thomas F. Pursell, Senior Counsel, and Patricia A. Sonnenberg, Assistant Attorney General, appeared on behalf of defendant. Also appearing were Michael V. Ciresi, Esq., and Roberta B. Walburn, Esq.

Upon all the files, memoranda, the argument of counsel and the court being fully advised in the premises,

IT IS HEREBY ORDERED:

1. That defendant's motion to dismiss is Granted.
2. That defendant's motion for sanctions is Granted.

a. Within 10 days of the date of this Order, defendant's counsel shall submit to the court, and to plaintiffs' counsel, an affidavit setting forth their costs relating to defending this action.

b. Plaintiffs' counsel shall have 10 days from receipt of defendant's affidavit to submit, in writing, any memoranda or other documents in opposition to defendant's calculation of costs and/or in mitigation of sanctions.

3. That plaintiffs' motion for partial summary judgment is Denied.
4. That plaintiffs' motion for declaratory judgment is Denied.
5. That the attached Memorandum be made a part hereof.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 15th day of December 1998

BY THE COURT
/s/
Peter Albrecht
District Court Judge

MEMORANDUM

Statement of Facts

Plaintiffs claim entitlement to a portion of the proceeds of the monetary settlement of the case entitled State of Minnesota and Blue Cross – Blue Shield of Minnesota v. Philip Morris Incorporated, et al. (hereinafter "Tobacco Litigation") which was filed in August 1994.[1]

I. The Tobacco Complaint

Minnesota Attorney General, Hubert H. Humphrey, III, brought the action "on behalf of the State of Minnesota pursuant to his authority under common law, as well as Minn. Stat. § § 8.01, 8.31, 325D.09-15, 325D.43-45, 325D.49-66 and 325F.67-70." Tobacco Complaint at ¶ 7. In addition to seeking declaratory and equitable relief and civil penalties, the Attorney General sought to vindicate the "*State's* proprietary interest in enforcing the *State's* rights to damages for economic injuries to the *State* which were caused by the unlawful actions of the cigarette industry." Id. (Emphasis added). **Those damages include increased expenditures for:**

a. Minnesota's Medicaid plan, Medical Assistance, see Minn. Stat. § 256B.01 *et seq.* and 42 U.S.C. 1396 *et seq.* "Under the Medical Assistance Program, the State of Minnesota pays for medical services provided to program recipients.[2] . . . . In fulfilling its statutory duties, the State of

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[1] Because defendant submitted as Appendix 1 the Second Amended Complaint dated January 6, 1998, and all material allegations are contained therein, all citations by this court to the "Tobacco Complaint" correspond to the Second Amended Complaint.

[2] In the instant action, plaintiff Jesse Lee Brown, a smoker, claims that he received treatment for smoking-related illness from January 1,

Minnesota has expended and *will expend* substantial sums of money due to the increased cost of providing health care services for treatment of smoking-related diseases." Id. at ¶ 7a. (Emphasis added).

b. General Assistance Medical Care, see Minn. Stat. § 256D.03, subd. 3.

> General Assistance Medical Care is available to qualifying persons who are not eligible for Medical Assistance.[3] *The State of Minnesota pays for the entire cost of this care.* In fulfilling its statutory duties, the State of Minnesota has expended *and will expend* substantial sums of money due to the increased cost of providing health care services for treatment of smoking-related diseases.

Id. at ¶ 7b. (Emphasis added).

c. MinnesotaCare, see Minn. Stat. § 256.9351 *et seq.*, as amended by 1994 Minn. Laws, Ch. 625.

> MinnesotaCare provides subsidized health coverage for qualifying Minnesotans not otherwise covered by Medical Assistance. In fulfilling its statutory duties, the State of Minnesota has expended *and will expend* substantial sums of money due to the increased cost of providing health care services for treatment of smoking-caused diseases.

1978, to December 31, 1996. His "treatment was paid for in whole or in part" by this program. Plaintiffs' Complaint at ¶ 2.

[3] In the instant action, plaintiff Ronald J. Bergeron, a smoker, received treatment paid for in its entirety by this program. Plaintiffs' Complaint at ¶ 3.

Id. at ¶ 7c. (Emphasis added).

d. The State Employee Group Insurance Program.

> The State of Minnesota, as an employer which makes available health coverage for its approximately 60,000 employees pursuant to statutory and contractual obligations, is mandated by law to offer comprehensive and major medical health coverage and benefits that include coverage for smoking-related diseases. The State of Minnesota has entered into contractual agreements with certain health care service providers and plans in order to make available to its employees health coverage that includes those mandated benefits. Blue Cross and Blue Shield of Minnesota Operates and administers the largest and most widely-used state employee health care service plan. The State of Minnesota has paid *and will pay* substantial sums of money pursuant to these statutory obligations due to the increased cost of providing health care services for treatment of smoking-caused diseases.

Id. at ¶ 7d. (Emphasis added).

e. Funding and promoting "wellness and healthy lifestyle programs in order to reduce health care costs, including smoking cessation." Id at 7e.

An additional allegation contained in the Tobacco Complaint was: "The unlawful actions of the cigarette industry threaten and interfere with the statutory and contractual duties of the State of Minnesota, as described

above, and with the public health of the citizens of the State of Minnesota." Id. at ¶ 7f.

In the Tobacco Complaint the State of Minnesota sought to recover for economic injuries enumerated above. The nine causes of action included a tort count based on the undertaking of a special duty to the public health;[4] two antitrust counts;[5] four statutory consumer protection violations,[6] and two equitable counts based on the state's out-of-pocket losses.[7]

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[4] Tobacco Complaint at ¶¶ 85-88, Count I (for State of Minnesota only), alleged "Undertaking of a Special Duty."

[5] Tobacco Complaint at ¶¶ 90-94, Count II, alleged Minnesota Antitrust Law: "Conspiracy to Unreasonably Restrain Trade and Commerce."

[6] Tobacco Complaint at ¶¶ 96-100, Count III, alleged Minnesota Antitrust Law "Monopolization of the Cigarette Market in Minnesota."

Tobacco Complaint at ¶¶ 102-105, Count IV, alleged "Consumer Fraud" pursuant to Minn. Stat. § 325F.69, subd. 1, which provides:

> The act, use, or employment of any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damages thereby, [is an unlawful practice].

Id.

Tobacco Complaint at ¶¶ 107-110, Count V, alleged "Unlawful Trade Practices" pursuant to Minn. Stat. § 325D.13, which provides: "No person shall, in connection with the sale of merchandise, misrepresent, directly or indirectly, the true quality, ingredients or origin of such merchandise." Id.

Tobacco Complaint at ¶¶ 112-115, Count VI, alleged "Deceptive Trade Practices" pursuant to Minn. Stat. § 325D.44, subd. 1, which provides, in part:

> A person engages in a deceptive trade practice when, in the course of business, vocation, or occupation, the person:
> (5) represents that goods or services have . . . characteristics, ingredients, uses, benefits . . . that they do not have . . . .
> (7) Represents that goods or services are of a particular standard, quality, or grade, . . . if they are of another.
> (13) Engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

Id.

Tobacco Complaint at ¶¶ 117-120, Count VII, alleges "False Advertising" pursuant to Minn. Stat. § 325F.67, which provides, in part:

> Any person, form, corporation, or association who, with intent to sell or in any way dispose of merchandise . . . directly or indirectly, to the public, for sale or distribution, or with intent to increase the consumption thereof, . . . makes, publishes, disseminates, circulates, or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, label, price tag, circular, pamphlet, program, or letter, or over any radio or television station, or in any other way, an advertisement of any sort regarding merchandise . . . or anything so offered to the public for use, consumption, purchase, or sale, which advertising contains any material assertion, representation, or statement of fact which is untrue, deceptive, or misleading, shall, whether or not pecuniary or other specific damage to any person occurs as a direct result thereof . . . be guilty [of an unlawful practice].

Id.

[7] Tobacco Complaint at ¶¶ 122-124, Count VIII, alleged Restitution: "Performance of Another's Duty to the Public," based in part upon the following:

II. The Nature of the State's Action Against the Tobacco Companies

The State brought a direct action against the tobacco companies. In its Ninth Affirmative Defense in its Answer dated September 16, 1994, defendant Philip Morris asserted, among other things, "Plaintiff State of Minnesota lacks authority and/or standing to bring any claim for medical expenses paid on behalf of Minnesota residents except to the extent it sues as the subrogee of those Minnesota residents." Id. at ¶ 145.

The State of Minnesota and Blue Cross-Blue Shield repeatedly stated that they had not brought an action in subrogation. For example, in the Memorandum in Support of Plaintiffs' Motion for Judgment on the Pleadings, dated

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> Plaintiffs have been and will be *required by statutory and contractual obligations to expend large sums of money* to pay for the harm caused by the wrongful conduct of defendants. Plaintiffs have the intent to charge, and recoup from defendants these sums of money. Plaintiffs' expenditures are immediately necessary to protect the public health and safety.

Tobacco Complaint at ¶ 123. (Emphasis added).

Tobacco Complaint at ¶¶ 126-129, Count IX, alleged Restitution: "Unjust Enrichment:" Defendants, through their wrongful conduct as described above, have reaped substantial and unconscionable profits from the sale of cigarettes in Minnesota. These cigarette sales, in turn, *have resulted in increased health care costs* directly attributable to cigarette smoking.

Without justification, defendants have failed to pay for the consequences of their unlawful conduct.

As a result, *plaintiffs have been required to pay for the medical costs* stemming from defendants' unlawful acts. Plaintiffs have borne a duty that – in law, equity and fairness – ought to have been borne by defendants.

Tobacco Complaint at ¶¶ 126-128. (Emphasis added).

January 26, 1995, the State and Blue Cross objected to defendants' propensity to transform their action into one of subrogation by asserting defenses that are applicable solely to subrogation actions:

> The State and Blue Cross have not brought this action as subrogated parties to any underlying tort claims that individual smokers may have against the cigarette industry. In a subrogation claim, one party steps into the shoes of another and asserts the rights of the other. By contrast, in the present case, the State and Blue Cross sue in their own right – in a direct action – to recover the enormous sums of money each spends to pay for health care for smoking-attributable diseases and to obtain equitable relief . . . . This direct action is based upon a breach of the duties that defendants owe directly to the State and Blue Cross. This direct action is further based upon the commitment of the State and Blue Cross to protect the public health and upon their status as two of the largest purchasers of health care services in the state.

Id. at 2-3, Appendix 3.

The distinction was a point of contention throughout the trial.[8]

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[8] *See, e.g.*, Plaintiffs Memorandum in Opposition to Defendants' Motion to Dismiss, dated February 21, 1995: "[The tobacco case] is an action brought by two of the largest purchasers of health care services in this state who have been injured in their 'business or property' by the wrongful acts of defendants." Id. at 3, Appendix 4; Reply Memorandum in Support of Plaintiffs' Motion for Judgment on the Pleadings:

> The damages incurred by the State and Blue Cross, in the form of increased expenditures for medical costs, are distinct and separate from any personal injury damages individual smokers have suffered, such as Bodily and mental harm and loss of

By Order dated May 18, 1995, Judge Kenneth Fitzpatrick, Ramsey County District Court, denied defendants' motions to dismiss and denied as premature the State's motion to dismiss certain affirmative defenses.

> While the Defendants' affirmative defenses related to subrogation may on their face not directly respond to Plaintiffs' allegations of independent and direct harm, such defenses cannot be determined at this time to be irrelevant. Further discovery is required. If discovery reveals, for example, that Plaintiffs have no direct cause of action, the *case could be converted to one involving issues of subrogation.*

Id. at 3-4 (Emphasis added).

The court warned that its denial of plaintiffs' motion "shall not be construed to sanction conversion of this case into one of subrogation." Id. at 4.

The tobacco defendants appealed the trial court's finding that Blue Cross had standing to the Minnesota Court of Appeals, which refused to grant discretionary review. Because it believed that the case presented an important legal issue, the Minnesota Supreme Court granted review. It upheld Blue Cross' standing on all counts, with the exception of the tort/special undertaking count. State of Minnesota and Blue Cross-Blue Shield of Minnesota v. Philip Morris Incorporated, et al, 551 N. W.2d 490 (Minn. 1996).

By Order dated January 27, 1998, the trial court took up the issue upon which it had previously deferred ruling; that is

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> earnings. Even defendants admit the distinctiveness of these two sets of claims. Thus, defendants note "the possibility of a later suit by smokers for additional damages such as pain and suffering" – but not medical costs.

Id. at 28-29 (Emphasis supplied).

whether defendants could assert as affirmative defenses the conduct of individual smokers. Plaintiffs' motion, for partial summary judgment dismissing defendants' affirmative defenses based upon the conduct of individual smokers was granted, in part, and denied, in part. The court found:

> That the conduct of individual smokers [was] irrelevant to the majority, but not all of the issues in this case;
>
> That defenses that a party may have against third parties are not imputed against others; likewise defenses available against individual smokers cannot be imputed against Plaintiffs' equitable claims;
>
> That there [was] no basis for the submission of the purported fault of individual smokers.

Id. at 2. Appendix 8.

On May 6, 1998, after the close of evidence, the trial court instructed the jury:

> You are instructed that this case is a direct action brought by the state of Minnesota and Blue Cross and Blue Shield of Minnesota. No individual smoker is a party to this action. The actions of individual smokers do not insulate defendants from liability, since the actions of individual smokers; for example, the fact that they smoke, are both foreseeable by defendants and in accord with defendants' intention for use of their product. Any knowledge by smokers of any health risks of cigarettes or any conduct of the smokers is not a defense as to whether a defendant or defendants have violated the law in this case.

Trial Transcript at 15643-44, Appendix 9.

III. The Tobacco Settlement

On May 8, 1998, the case was settled. Two documents memorialize the terms. The first document is entitled, "Settlement Agreement and Stipulation for Entry of Consent Judgment."

The lawsuit is described as follows:

> [T]he State of Minnesota, through its Attorney General Hubert H. Humphrey III, and Blue Cross and Blue Shield of Minnesota, commenced this action on August 17, 1994, asserting various claims for monetary, equitable and injunctive relief on behalf of the State of Minnesota and Blue Cross and Blue Shield of Minnesota against certain tobacco manufacturers and others as Defendants[.]

Id. at 2, Appendix 10.

Part II A, "Settlement Payments" provides:

> A. Settlement Receipts. The payments to be made by the Settling Defendants under this Settlement Agreement are in satisfaction of all of the *State of Minnesota's claims for damages incurred by the State* in the year of such payment or earlier years related to the subject matter of this action, including, without limitation, *claims for equitable and injunctive relief, claims for health care expenditures and claims for punitive damages*, except that no part of any payment under this Settlement Agreement is made in settlement of an actual or potential liability for a fine, penalty (civil or criminal) or enhanced damages.

Id. at 7 (Emphasis added).[9]

In September 1996 a class action suit, entitled Thompson v. American Tobacco, Incorporated, et al., (File No. 3-96-CV888 (D. Minn.)) on behalf of all addicted smokers (a group which presumably includes Brown and Bergeron) was filed in Ramsey County District Court. It was removed to federal district court and is scheduled for trial in March 2000.

IV. Minnesota's Medicaid and General Assistance Medical Care Programs

The program under which plaintiff Jesse Lee Brown seeks to recover is Medicaid, a federal-state partnership, under 42 U.S.C. § 1396, *et seq.* and Minn. Stat. § 256B. The program under which Ronald J. Bergeron seeks to recover is the General Assistance Medical Care program, established pursuant to state law, Minn. Stat. § 256D.03 (1996). Under these programs, the state pays certain health care costs of eligible individuals, referred to as "recipients." Pursuant to these statutes, the Department has a right to recover its program costs when one of its recipients has been injured by a third party. Minn. Stat. § 256B.042 (Medicaid) provides, in part:

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[9] Defendant's brief explains the face value of the settlement as follows:

> The figure of $6.17 billion commonly assigned as the settlement's value is derived by adding the face value of the payments, without adjustment or discounting, over a period of 25 years. The 25-year period is essentially arbitrary, but became a convention for valuing tobacco settlements - since used in all settled state cases - during early discussions over a potential national settlement.

Defendant's Brief in Support of Motion to Dismiss at 9, fn5.

Third Party Liability.

Subdivision 1. When the state agency provides, pays for or becomes liable for medical care, *it shall have a lien for the cost of the care, upon any and all causes of action which accrue to the person to whom the care was furnished,* or to the person's legal representatives, as a result of the injuries which necessitated the medical care.

* * * *

Subd.3. *The attorney general, or the appropriate county attorney acting at the direction of the attorney general, shall represent the state agency to enforce the lien created under this section* or, if no action has been brought, may initiate and prosecute an independent action on behalf of the state agency against a person, firm, or corporation that may be liable to the person to whom the care was furnished.

Subd. 5. **Costs deducted.** Upon any judgment, award, or settlement of a cause of action, or any part of it, *upon which the state agency has filed its lien,* including compensation for liquidated, unliquidated, or other damages, reasonable costs of collection, including attorney fees, must be deducted first. *The* full *amount of medical assistance paid to or on behalf of the person as a result of the injury must be deducted next, and paid to the state agency.* The rest must be paid to the medical assistance recipient or other plaintiff. *The plaintiff, however, must receive at least one-third of the net recovery* after attorney fees and other collection costs.

Id. (Emphasis added).

Minn. Stat. § 256D.03, subd. 8 (Medical Assistance) provides, in part:

> (c) Upon furnishing general assistance medical care or general assistance to any person having private accident or health care coverage, or having a cause of action arising out of an occurrence that necessitated the payment of assistance, the state agency shall be subrogated, to the extent of the cost of medical care, subsistence, or other payments furnished, to any rights the person may have under the terms of the coverage or under the cause of action.
>
> This right of subrogation includes all portions of the cause of action, notwithstanding any settlement allocation or apportionment that purports to dispose of portions of the cause of action not subject to subrogation.
>
> (d) To recover under this section, the attorney general or the appropriate county attorney, acting upon direction from the attorney general, may institute or join a civil action to enforce the subrogation rights established under this section.

Id.

As of this date, the State of Minnesota has not filed any liens against plaintiffs consistent with the statutory provisions outlined above.

Discussion

I. Applicable Standard for a Rule 12 Motion to Dismiss

Defendant has moved this court to dismiss the Complaints pursuant to Minn. R. Civ. P. 12.02, which provides, in part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> (e) failure to state a claim upon which relief can be granted[.]

Id.

Although the court may ordinarily not go outside of the pleadings to decide the motion, and must examine only the claim as stated by the party asserting it, Royal Realty Co. v. Levin, 243 Minn. 30, 66 N.W.2d 5 (1954), the court may consider authenticated documents and matters of public record without converting the motion to dismiss to a motion for summary judgment pursuant to Rule 56. Henson v. CSC Credit Services, 29 F.3d 280, 284 (7th Cir. 1994).

The court must determine only that the complaint sets forth a legally sufficient claim for relief, which is the standard of review applicable to a dismissal for failure to state a claim upon which relief may be granted. Geldert v. American Nat'l Bank, 506 N.W.2d 22, 25 (Minn. Ct. App. 1993), *pet. for rev. denied* (Minn. Nov. 16, 1993). In addition, all factual inferences must be drawn in favor of the party asserting the claim in the Complaint. Northern States Power Co. v.

Franklin, 265 Minn. 391, 122 N.W.2d 26 (1963). Only if all theories of recovery are unavailable to the claimant on the claim as stated may a court grant a motion to dismiss. It is immaterial whether or not the court believes that plaintiff can prove any of the facts alleged.

II. The Law Mandates This Court To Grant Defendant's Motion to Dismiss.

Minnesota statutes and the law of the tobacco case lead this court to conclude that plaintiffs' claims are wholly without support. The State of Minnesota and Blue Cross brought a *direct action* against the tobacco companies, a distinction that alone dictates the outcome. It is only through a tortured and bewildering transformation of the statutes, and of the pleadings, that plaintiffs can argue entitlement to a portion of the settlement proceeds. The State brought the tobacco litigation to recover its own costs for treating smoking-related disease. Contrary to the only procedural posture that would validate plaintiffs' contentions, the State did not bring the action "in a representative capacity pursuant to Minn. Stat. § 256B.01, *et seq.* and Minn. Stat. § 256D.03, subd. 3." Complaint at ¶ 6. Fusing the artful and the clumsy, plaintiffs attempt to recast the Tobacco Complaint into one of subrogation, effectively transforming a provision that entitles the state to recover its costs when a recipient recovers from a third party to a provision that forces the state to disgorge one-third of the settlement to recipients. The tobacco companies tried, for naught, to exploit this same turn of phrase throughout the trial. It is no more compelling when it is asserted on behalf of those who have been treated by the state, at little or no cost to themselves.

At the oral argument on these motions, one of plaintiffs' attorneys argued that the state would be "nowhere" without 70,000 victims of smoking. That is correct in the rudimentary sense in that if there were no addicted smokers, requiring

treatment and hospitalization paid for by the state, defendant would not have initiated the suit against the tobacco companies. Conceding that fact, defendant did not receive anything that rightfully belongs to plaintiffs as part of the tobacco settlement.

Minn. Stat. § § 256B.042 (Medicaid) and 256D.03 (General Assistance Medical Care) authorize the *Department* to recover costs when a recipient who has been injured by the conduct of a third party initiates a cause of action to recover from that party. Neither of the named plaintiffs has initiated an action to recover from the cigarette companies.

The formula set out in the Medicaid and General Assistance Medical Care statutes does not apply to this case. The Medicaid lien statute ensures that when a recipient, who has received treatment from the state, recovers from a third party responsible for the injuries, the state also recovers a portion of those funds. Lundberg v. Jeep Corp., 582 N.W.2d 268 (Minn. Ct. App. 1998). The rationale behind the formula provision that insures that the injured recipient receive no less than one-third of the proceeds is to encourage recipients to bring individual actions against third parties responsible for their injuries. A recipient would not be encouraged to do so if all of the lawsuit proceeds were directed to the state, which as far as the recipient was concerned, was treating him or her free of charge in the first place. The law protects the interests of the State – care provider. State Dept. of Human Services v. Bengston, 506 N.W.2d 38 (Minn. CT. App. 1993).

Even if the statutes cited by plaintiffs in support of propositions for which they do not stand were not clear on their face, (which this court believes they are) plaintiffs' interpretation is ludicrous, and its implementation would lead to a preposterous result. Minn. Stat. § 645.17 "Presumptions in Ascertaining Legislative Intent"[10] provides:

---

[10] This court did not rely upon this provision, however, as it was convinced by the statutes, and by the law of the tobacco case, that it was required to dismiss plaintiffs' suit in its entirety.

> In ascertaining the intention of the legislature the courts may be guided by the following presumptions:
>
> (1) The legislature does not intend a result that is absurd, impossible of execution, or unreasonable;
>
> (2) The legislature intends the entire statute to be effective and certain[.]

Id.

Plaintiffs' interpretation flies in the face of anything the legislature could have intended. Were plaintiffs able to recover under the statutes that this court believes are clearly inapplicable, they would be entitled to receive between $2.06 billion and $4.86 billion dollars, as compensation for medical expenses that they, for the most part, never incurred, an amount in *addition* to whatever amount any of the individual plaintiffs might receive for his or her compensable damages, such as pain and suffering. Their individual claims are not foreclosed by the settlement. Certainly that is an absurd result.

Plaintiffs' Conduct Does Not Comport With Obligations Under Rule 11.

This court considered the following additional facts to decide the merits of defendant's motion to sanction plaintiffs' counsel pursuant to Minn. R. Civ. P. 11, which provides that the pleadings must be signed by at least one attorney, and

> [t]he signature of an attorney or party constitutes a certification that the pleading . . . has been read; that to the best of the signer's knowledge, information and belief formed *after reasonable inquiry it is well grounded in fact and is warranted by existing law or*

> *a good faith argument for the extension, modification, or reversal of existing law,* and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation . . . . . If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses because of the filing . . . including reasonable attorney fees.

Id. (Emphasis added).

By letter dated July 22, 1998, addressed to plaintiffs' counsel, Lee E. Sheehy, Chief Deputy Attorney General wrote, in part:

> We have reviewed the class action complaint which you have signed in the above-captioned action. It is clear that whoever drafted the complaint took no reasonable steps to investigate and did not understand the State of Minnesota's action in the underlying cigarette litigation, The State of Minnesota and Blue Cross and Blue Shield of Minnesota v. Philip Morris, Inc. et al., Ramsey County District Court, C1-94-8565. The basic factual and legal predicate upon which your complaint is based is false and/or erroneous, as even a cursory review of the public file in this action would reveal. The state's complaint and prosecution of the case was always as a direct action by the State of Minnesota. The State did not file a subrogation action, and the State did not sue to recover damages sustained by smokers.

* * * * *

> The State of Minnesota did not sue, seek or receive damages on behalf of any individual smokers for any damages or injuries sustained by smokers or any element of damages which your clients would be entitled to. To the extent that any of your clients or any putative class members have suffered personal injury losses, they would certainly be entitled to sue the tobacco companies since those causes of action were not litigated in our case.

* * * * *

> [Y]ou have a duty to assure that your claim is grounded in the law. The class action complaint which you signed is frivolous. It is clear that no reasonable inquiry was undertaken prior to the signing of your complaint. We expect that you will voluntarily dismiss before the expenditure of unnecessary attorney time and costs by the State. Please advise this Office by the close of business on Monday, July 27, 1998, whether you will discharge your responsibilities as officers of the court under applicable statutes and rules of civil procedure and dismiss your action.

Exhibit 1 at Tab 12.

The response of plaintiffs' counsel to Mr. Sheehy was swift and unequivocal. By letter dated July 27, 1998, John A. Cochrane wrote:

> Your letter of July 22, 1998 has been reviewed by the addressees. Counsel for Plaintiffs after careful

> review of all the legal aspects underlying the case see it as a matter to be resolved by the Court under the Declaratory Judgment Act, M.S.A. 555 et seq. All Plaintiffs' counsel concur.

Exhibit 2 at Tab 13.

On July 29 and 30, 1998, shortly after the exchange of the above-quoted correspondence, defendant answered an inquiry put to it by Dave Taylor on behalf of plaintiffs' counsel, reaffirming that defendant had not filed any liens against plaintiffs Brown and Bergeron. Janice Taylor, supervisor of the Minnesota Department of Human Services' Benefit Recovery Section, explained the procedure followed by the department. Ms. Taylor informed Mr. Taylor that parties to a lawsuit and their attorneys are notified when the Department files a lien. Ms. Taylor corrected Mr. Taylor's perception that the Department had a lien whenever it paid a recipient's medical expenses. "[T]he Department is required to file a lien in order for it to be effective and the filing occurs only when it learns of a recipient's legal action." Aff. of Janice Taylor at ¶¶ 10-11, Appendix 14.

It is neither the contents of Mr. Sheehy's letter to plaintiffs' counsel nor the fact that it was written at all that causes this court to find that sanctions are appropriate. Indeed, if all an attorney were required to do to guarantee that his or her opponent were sanctioned, is to write a tough-talking letter, case files would be more packed with them than they already are. It is because the letter was so straightforward in reporting the state of the law, and so consistent in the manner in which it articulated defendant's theories of recovery with regard to the tobacco suit that the court believes plaintiffs were put on notice to reassess the wisdom of bringing this action.

For purposes of assessing sanctions pursuant to Rule 11, this court posed two questions. First, it was not sufficient that it found that plaintiffs' bringing the action was wrong; it

required a quantification of *how* wrong it was, a question this court believes should be answered with "monumentally." The second question was whether there existed *any* shred of evidence to support bringing it, a question this court believes should be answered in the negative. Even the most cursory examination of the case would have plainly revealed its flaws; they are inescapable. Relying upon the conclusions above, this court believes that sanctions are appropriate.

CONCLUSION

For the reasons outlined above, this court grants defendant's motion to dismiss and defendant's motion for sanctions. Although this court considered plaintiffs' motion for partial summary judgment and plaintiffs' motion for declaratory judgment, because the court's ruling on defendant's motion to dismiss is dispositive of all issues, it did not include the analysis in this Order.

H.P.A.

* * * * *

medical care and the state receiving the right to sue only for the cost of the medical care. Under this argument, the recipient and the state would each have to bring their own separate actions in order to recover on those portions of the cause of action they each possessed. Such a course of events is clearly at odds with the statute's provision that the state will bring its own action only when the recipient has brought no action. Under the statute, the assignment by MA recipients to the state of the right to payment for medical care from liable third parties creates a "shared right" to bring a cause of action against those third parties.

Moreover, this shared ownership of the cause of action makes practical sense given the primary method the Legislature has chosen to seek reimbursement when third party tortfeasor may be liable for the costs of care provided. From the language of the statute it is clear that the Legislature intended to obtain recovery of MA by relying primarily on individual recipients seeking recovery from potentially liable tortfeasors. This makes sense because individual recipients and their attorneys are in the best position to identify and assess the potential liability of third parties and to effectively advocate for recovery. Furthermore, the injured recipient has a natural incentive to seek recovery and will generally do so despite the fact that some portion of the recovery, maybe even the majority, must go toward satisfying the state's lien. Finally, to provide an incentive to the recipient bringing a tort suit even in a case where the state's lien would otherwise eliminate or nearly eliminate the recipient's own recovery, the

MA lien statute provides that the recipient will be allowed to retain at least a third of the net recovery.[3]

---

[3] Mr. Lundberg's brief inaccurately states that the MA lien statute "limits the compensation of the Medical Assistance recipient to a maximum of 22% of the gross recovery where significant medical expenses are involved." (Resp't's Br. at 5 (emphasis added).) In a situation like Mr. Lundberg's, where attorney's fees are one-third of the recovery, the MA lien statute does not limit the recipient's recovery to a maximum of 22%, but rather assures that the recipient will receive a minimum of 22%. Indeed, in this case, as noted in DHS's main brief at page 19, after satisfying the MA lien, the actual proceeds to Mr. Lundberg are $325,866.69, or nearly half of the gross recovery. Moreover, Mr. Lundberg's comparison of the amount received by the recipient with the gross recovery is somewhat misleading; comparison is more aptly made with the net recovery after reasonable costs and attorney fees. In any personal injury case taken on a contingency, where there is no MA lien the plaintiff will receive the net recovery. The MA lien
(Footnote Continued On Next Page.)

Excerpt from the Tobacco Trial Judge's Charge to Jury.

In The Matter Of:

State of Minnesota, et al v.
Philip Morris, et al

Trial Volume Number 77
May 6, 1998

Stirewalt & Associates
P. O. Box 18188
Minneapolis, MN USA 55418
(800) 553-1953

Original File 77.v1, 109 Pages
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questions regardless of your answers to the other questions in the special verdict form. You are not to consider the possible effects of your answers to the other questions when you determine damages. Your verdict is not complete until these questions are answered.

The term "damages" means a sum of money that will fairly compensate the state of Minnesota and Blue Cross and Blue Shield of Minnesota for their payment of health-care costs caused by smoking. Now a party seeking damages must prove the nature, extent, duration, and consequences of its injury. On the other hand, determination of damages must not be based on speculation or guess. On the other hand, difficulty in determining the amount of damages is no reason for denying damages so long as there is a reasonable basis upon which to approximate the amount.

There was certain evidence that has been admitted regarding the taxation of cigarettes. This court has ruled, however, that defendants may not offset any damages they may owe by reason of the amount of excise taxes on cigarettes. Accordingly, I instruct you you should – that should you find that the plaintiffs are entitled to damages, you may not

* * * * *

Excerpt from Petitioners' Trial Memorandum Below.

* * * * *

> Compensation on the foregoing contingency is to be paid by the State to the special attorneys on the following basis: twenty-five percent (25%) of the total recovery to the State, including but not limited to compensatory or punitive damages, restitution, civil penalties, interest, and any amounts which may later be payable to the federal government under the Medicaid program.

Id. at p. 3, ¶ 3 (emphasis added).

C. The Second Amended Complaint Upon Which The State Went To Trial References The Medical Assistance And General Assistance Statutes.

In the weeks preceding the trial of the matter against the tobacco industry, the State served and filed a Second Amended Complaint (hereinafter "Amended Complaint"). Shelquist Aff., Exh. 2. One paragraph in the Amended Complaint specifically references the Federal Medicaid Act and the Minnesota Medical Assistance Program, incorporating by reference two of the three statutes at issue in this litigation. Id. at p. 3, ¶ 7.a ("Such damages include but are not limited to increased expenditures for...Minnesota's Medicaid plan, medical assistance, see Minn. Stat. § 256B.01 et seq. and 42 U.S.C. § 1396 et seq."). A second paragraph in the Amended Complaint specifically references the Minnesota General Assistance Statute, incorporating by reference the third of the three statutes at issue in this litigation. Id. at pp. 2-3, ¶ 7.b. ("Such damages include but are not limited to increased expenditures for...General

Assistance Medical Care, see Minn. Stat. § 256D.03, subd. 3").

D. The State Specifically Identified The 70,000 People Before This Court As Being Afflicted With Smoking Attributable Illnesses Which Resulted In State-Funded Treatment.

It is indisputable that injuries of these class members provided the basis for the State's claims. The State has argued itself that the tobacco action sought to recover health care costs for treating a group of persons afflicted with smoking-related illnesses.

Toward that end, the State went to considerable trouble to develop its model of damages for trial, a process which was described in great detail over the course of several day's testimony by Dr. Timothy S. Wyant:

> Q. Are you prepared today to offer an opinion about the health-care costs paid by the State of Minnesota and Blue Cross Blue Shield of Minnesota to treat diseases and conditions caused by smoking, made worse by smoking, or made more expensive to treat by smoking?
> A. Yes.
> Q. And is the time period covered by your opinions from 1978 through 1996?
> A. Yes.

Shelquist aff., Exh. 3 at p. 5313,l. 19-p. 5314,l. 3. In order to collect the information about the plaintiffs now before this Court, Dr. Wyant, with the help of others, reviewed confidential patient billing information to identify smoking-attributable disease:

Q. Now as part of your responsibilities, did you collect claims records from the State and Blue Cross Blue Shield of Minnesota?

A. Yes, I did.

Q. Could you first tell us what you mean by a "claims records"?

A. Well, a claims record is essentially a -- it's a computerized doctor bill. When a doctor or a hospital in Minnesota sends a bill into Blue Cross or--or to Medicaid, it gets entered on a computer, or sometimes these days its already computerized before it gets there, and that's the way it gets into the system for review and for payment of the bill, is getting into that computerized system. So when -- when I say a claims record, that means going back to that computer system and looking at whatever was entered into the computer for that doctor or hospital bill at sometime over this period.

Q. From what programs did you obtain the State claims records?

A. Well, the State claims records came from two programs, Minnesota Medicaid and Minnesota General Assistance Medical Care, GAMC.

Id. at p. 5315,l. 19-p. 5316,l. 16. This task was monumental, requiring Dr. Wyant and others to search hundreds of millions of records:

Q. Dr. Wyant, could you first of all tell us that title of that exhibit?

A. This exhibit is called "Billing Records Analyzed in the Statistical Model."

Q. And could you tell us what is on that exhibit?

A. This is just a count of the number of records in the computer files that we assembled to work with in building our statistical model. Again, these are basically computerized doctors' bills over this time period of

1978-1996. And for the State of Minnesota we assembled 224 million records, and for Blue Cross Blue Shield of Minnesota we looked through 60 million records, and in these records we found more than 90,000 people who were being treated for one of the major smoking-attributable diseases.

Q. And how did you determine the 90,000 Minnesotans who were treated for major smoking-attributable diseases in these records?

A. We used ICD-9 codes and some rules that were developed by Dr. Samet.

Id. at p. 5322,l. 10-p: 5323,l. 7.

The damages sought by the State were built on the aggregated records of the class members' medical treatment--claims in which the same class members have a "joint interest" and for which they would seek compensation from the tobacco companies--if the State had not settled those claims. During trial, Dr. Wyant testified as to how the aggregation or grouping of the individual claims worked.

Q. If we could have on the Elmo Trial Exhibit 30153, which has been previously admitted. Is that the list provided to you by Dr. Samet--

A. Yes, it is.

Q. --of the diseases caused by smoking and their ICD-9 code numbers?

A. Yes.

Q. And can you identify those for the record, please.

A. These are the major smoking-attributable diseases, and after each disease or set of diseases are ICD-9 codes. So it starts with atherosclerosis, the ICD-9 codes 440 or 441, and 444; bladder cancer is code 188; cerebrovascular disease or stroke, 342 and 430 to 438; chronic obstructive pulmonary disease or COPD is 491 to 492 and 496; coronary heart disease, 410 to 414, 425,

427 to 428; esophageal cancer, 150; kidney cancer, 189; laryngeal cancer, 161; lung cancer, 162; oral cancer, 140 to 141 and 143 to 149, pancreatic cancer, 157; peptic ulcer disease, 531 to 533; and diminished health status/respiratory morbidity and mortality, including respiratory infections, 460, 464 to 466 and 480 to 486.

Q. Now are those code numbers found in the manual that you just identified?

A. Yes.

Q. And in fact that's where those numbers were taken from, is that right?

A. That's correct.

Q. Dr. Wyant, could you give us an example of what a claims record looks like for an individual on GAMC. And with the court's permission, come down and use the flip chart.

A. Well, this is just an example of the--the kind of information you see in a claims record and the kinds of things we look at when we do printouts to check and make sure we have a good understanding of this information.

I'll give an example from the GAMC program, a man 51 years old. Against, this is the kind of information we get off the system.

We've taken out any I.D. information, but we do know what their gender is and how old they are, although we did take off the actual birth date.

The date in these claims records, they do come in the form of these ICD-9 codes, and one you may see in these claims is like a 786.5.

The codes you see up on the Elmo are all to three digits. The classification system can really go finer than that, and so when you see the actual codes on the computer, they'll actually have another digit attached to them. And this is a code for chest pain. And this is not a real person I'm writing up here, but these are generally the kinds of

dollars and diseases that--that we would typically see in our work.

You know that is chest pain by either looking it up in that manual, if you're doing it by hand, or you use versions--what we did was use versions of that manual that are on the computer, so when we saw 786.5, that was translated into chest pain for us so we could see what was happening.

Then the next things you might see is 162.9 in the kinds of claims we're looking at, which is a lung cancer. Again, this is one of the 162 codes that you see up in the Elmo. Lung cancer is 162, and point one, point two, point three they use for different sites of lung cancer in the lung. And this cost, we see substantial dollars associated with that code.

And another thing we see in these records is what's happening. In this case the person went to the hospital. And to give you--as I go through these with Dr. Samet, I try to get, and any biostatistician tries to get, kind of a general, common-sense understanding of what's going on here, and the kind of understanding that I developed, what typically goes on in these records is that here's a person that comes in with chest pain, and then it turns out the diagnosis, what was causing that chest pain, is lung cancer. As the person gets out of the hospital, you're likely to see a different kind of code, one starting with a V, a V72.5, and that would be a code for a routine x-ray exam. Might only cost fifty dollars. Then something you see not uncommonly is these records might be 998.5, post operative complication, which against might cause the person to have to go back into the hospital for treatment. Could easily cost a couple thousand dollars.

And another thing you see a lot in the records is prescription drugs, and particularly you see a lot of prescription drugs where there's serious illnesses like this, and that might be five hundred dollars. Not be

unusual for several months for person like this. Now there is no ICD-9 code for prescription drugs. The reason for that is generally people go to their pharmacist to get prescription drugs and the pharmacist doesn't fill in ICD-9 codes for diagnoses, so you don't typically see any codes for prescription drugs in the system.

And then another code you might typically see in a sequence like this for a person is something like a V58.0, that's for radiation therapy, or a V58.1, which is chemotherapy. Generally those sessions are a little more expensive. And you might see a V70.8, which is a general medical exam for a hundred dollars. All of these things, again, just speaking of my general understanding from--from talking with Dr. Samet and getting a common-sense picture of what goes on in these records and how to deal with them in a statistical model.

Of course this is very common-sensical. You have an operation, may have complications, you got prescription drugs, couple of other problems, and of course the cancer radiation and chemotherapy are standard courses of treatment. And then as time goes on, might see something like this, 844.9, this is just a leg and knee sprain, maybe a doctor's visit for a hundred bucks, and then you might see something like this, 724.5 for a backache, and then you might see 198.5, secondary bond cancer. See a lot of these with the lung cancer claims just going through the data. It costs a lot to treat. And again this could be just as when a person comes in, they have chest pain and then it's diagnosed as lung cancer--some of these orthopedic problems like backache could be the first signs of the secondary bone cancer. And then after this you can sometimes see a code like this 733.1. That's a code for pathological fracture, and that's where the cancer invades the bone, the bones become weak and the bones start breaking. And then you see another thing that's contained in claims data: person typically dies, for

a patient like this. And there are a couple aspects of this that are important for understanding the statistical analysis. This one is oversimplified, because there are dates on these and--and usually you wouldn't see just this many services. You can kind of think that every time I wrote a line here, you're going to see several illness in the computer record with different dates. For example, you wouldn't typically have just one chemotherapy session. You see in these records a person like this would be going in for visits and hospital stays just over and over and over against over many weeks. But I've just given one line a piece here.

Another aspect of this that's -- that's important for statistical modeling is that only one of these codes appears on the chart up there, just that one.

Q. Which one is that, doctor?

A. That is 162.9, lung cancer. Now as you look through all the things that are happening to this person, and if you sit down as I did with Dr. Samet, it's pretty clear that if you walked into this just as a statistician and say, well, I know how to get all the lung cancers out of the Minnesota claims data, I'll just look for codes 162, and if you did that in this person, for example, well you'd miss the chest pain, which may be the first sign of the lung cancer, you'd miss the follow-up x-ray exam because that doesn't have a 162, you'd miss the post-op complications and you'd miss any of the prescription drugs that are related to the lung cancer and what's going on, because over in this ICD-9 code you're not seeing a 162 code. And then you'd miss the radio-therapy, which is the V58, you'd miss the chemotherapy, and you'd miss the general follow-up medical exam.

Now the knee and leg sprain we'll talk about a little later when we talk about the third reduction. Maybe that one's okay in this. Backache, well no. It could be related to the secondary bone cancer, but we missed that. We

certainly missed the secondary bone cancer, that's a 198.5 and that's not a 162. And we'd miss the pathological fracture. So part of doing the statistical modeling and using this data in a in a common-sensical way is to make sure that we don't go into it and miss all these things when we're trying to look, for example, at smoking-attributable expenditures due to lung cancer. The other aspect of this that's fairly typical for a GAMC claim is that we're basically not seeing the person until they have lung cancer, and the majority of the GAMC claims for lung cancer are like that. And again, my understanding talking from administrators in the program as -- as well as looking at the claims data, that a typical situation is there will be someone who doesn't have much financial resources but is getting along okay, and then all of a sudden they're hit with all this stuff. And if they didn't--if their resources were low enough to begin with, once they start having these bills, it's likely that they can qualify for General Assistance Medicare--Medical Care in order to pay for this sequence of treatments.

Id. at p. 5340,l. 2-p. 5348,l. 1.

Based upon the sworn testimony identifying and analyzing the treatment of the plaintiffs now before this Court the State of Minnesota demanded damages of $1.3 billion:

> Q. [W]hat is the estimate for the smoking-attributable expenditure for the State of Minnesota during the period 1978-1996?
>
> A. That estimate is $1.31 billion, or as is stated here, $1,310 million dollars.

Id. at p. 5428,l. 13-17.

During discovery, the tobacco litigation trial court ordered the State to identify, by name, a list of persons the State claimed were current or former smokers, who had

smoking attributable illnesses requiring medical care paid for by the State and produce some of them for depositions.

* * * * *

Excerpt from Petitioner Brown's Tobacco Trial Deposition Transcript.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

THE STATE OF MINNESOTA,
BY HUBERT H. HUMPHREY, III
ITS ATTORNEY GENERAL,

PLAINTIFFS,

vs. FILE NO. C1-94-8565

PHILIP MORRIS INCORPORATED, R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, B.A.T. INDUSTRIES P.L.C., LORILLARD TOBACCO COMPANY, THE AMERICAN TOBACCO COMPANY, LIGGETT GROUP, INC., THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., AND THE TOBACCO INSTITUTE, INC.,

DEFENDANTS.

DEPOSITION OF
JESSE BROWN

March 11, 1997
9:43 a.m.

REPORTED BY:
JENNIFER S. SATI, RPR, CRR
RAY J. LERSCHEN & ASSOCIATES
620 PLYMOUTH BUILDING
MINNEAPOLIS, MINNESOTA 55402

DEPOSITION OF JESSE BROWN, taken at the Law Offices of Dorsey & Whitney, Pillsbury Center South, 220 South Sixth Street, Minneapolis, Minnesota, on the 11th day of March, 1997, commencing at 9:43 a.m., before Jennifer S. Sati, Notary Public, Registered Professional Reporter and Certified Realtime Reporter.

* * * *

APPEARANCES

On Behalf of the Plaintiffs:

Robins, Kaplan, Miller & Ciresi
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402

BY: Kathleen Flynn Peterson

On Behalf of Lorillard Tobacco Company:

Shook, Hardy & Bacoa
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105-2118

BY: Jeffrey S. Nelson

Doherty, Rumble & Butler
2800 Minnesota World Trade Center
30 East Seventh Street
St. Paul, Minnesota 55101-4999

BY: Howard Roston

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* * * * *

STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

THE STATE OF MINNESOTA,
BY HUBERT H. HUMPHREY III,
ITS ATTORNEY GENERAL,

Case Type: Other Civil
Court File No.
C1-94-8565

and

BLUE CROSS AND BLUE SHIELD
OF MINNESOTA,

Plaintiffs,

vs.

PHILIP MORRIS INCORPORATED,
R.J. REYNOLDS TOBACCO COMPANY,
BROWN & WILLIAMSON TOBACCO
CORPORATION, B.A.T. INDUSTRIES
P.L.C., BRITISH-AMERICAN TOBACCO
COMPANY LIMITED, BAT (U.K. &
EXPORT) LIMITED, LORILLARD
TOBACCO COMPANY, THE AMERICAN
TOBACCO COMPANY, LIGGETT GROUP,
INC., THE COUNCIL FOR TOBACCO
RESEARCH-U.S.A., INC., and THE
TOBACCO INSTITUTE, INC.,

Defendants.

SETTLEMENT AGREEMENT AND STIPULATION FOR ENTRY OF CONSENT JUDGMENT

THIS SETTLEMENT AGREEMENT AND RELEASE ("Settlement Agreement") is made as of the date hereof by and among the parties hereto, as indicated by their signatures below, to settle and resolve with finality all claims of the State of Minnesota relating to the subject matter of this action which have been or could have been asserted by the State of Minnesota.

WHEREAS, the State of Minnesota, through its Attorney General Hubert H. Humphrey III, and Blue Cross and Blue Shield of Minnesota, commenced this action on August 17, 1994, asserting various claims for monetary, equitable and injunctive relief on behalf of the State of Minnesota and Blue Cross and Blue Shield of Minnesota against certain tobacco manufacturers and others as Defendants;

WHEREAS, the Defendants have denied each and every one of Plaintiffs' allegations of unlawful conduct or wrongdoing and have asserted a number of defenses to Plaintiffs' claims, which defenses have been contested by Plaintiffs;

WHEREAS, the parties hereto wish to avoid the further expense, delay, inconvenience, burden and uncertainty of continued litigation of this matter (including appeals from any verdict), the State of Minnesota and the Settling Defendants have agreed to settle this litigation pursuant to terms which will achieve for the State of Minnesota (and thus for the people of the State of Minnesota) significant funding for the advancement of public health, the implementation of important tobacco-related public health measures in Minnesota, as well as funding for national research dedicated to studying and significantly reducing the use of Tobacco Products by youth;

WHEREAS, the State of Minnesota and Settling Defendants have agreed to settle this lawsuit on terms set

forth in this Settlement Agreement and Stipulation for Entry of Consent Judgment and the attached Consent Judgment;

WHEREAS, the parties have further agreed to jointly petition the Court for approval of the Consent Judgment, on the grounds that settlement would be in the public interest;

NOW, THEREFORE, BE IT KNOWN THAT, in consideration of the payments to be made by the Settling Defendants, the dismissal and release of claims by the State of Minnesota and such other consideration as described herein, the sufficiency of which is hereby acknowledged, the parties hereto, acting by and through their authorized agents, memorialize and agree as follows:

I. GENERAL PROVISIONS

A. Jurisdiction. The State and the Settling Defendants acknowledge that this Court has jurisdiction over the subject matter of this action and over each of the parties to this Settlement Agreement, and that this Court shall retain jurisdiction for the purposes of implementing and enforcing this Settlement Agreement. The parties hereto agree to present any disputes under this Settlement Agreement, including without limitation any claims for breach or enforcement of this Settlement Agreement, exclusively to this Court. The Court may, upon the State's application, enter a Consent Judgment in the form attached hereto as Exhibit A. The cumulative terms of this Settlement Agreement and Stipulation for Entry of Consent Judgment, and the attached Consent Judgment, may be referred to for convenience as this "Agreement" or "Settlement Agreement."

B. Voluntary Agreement of the Parties. The State and the Settling Defendants acknowledge and agree that this Settlement Agreement is voluntarily entered into by all parties hereto as the result of arm's-length negotiations during which all such parties were represented by counsel. The State and Settling Defendants understand that Congress may enact

legislation dealing with some of the issues addressed in this Agreement. Settling Defendants and their assigns, affiliates, agents, and successors hereby waive any right to challenge this Agreement or the Consent Judgment, directly or through third parties, on the ground that any term hereof is unconstitutional, outside the power or jurisdiction of the Court, preempted by or in conflict with any current or future federal legislation (except where non-economic terms of future federal legislation are irreconcilable).

C. Definitions.

For the purposes of this Settlement Agreement and attached Consent Judgment, the following terms shall have the meanings set forth below:

1. *"State"* or *"State of Minnesota"* means the State of Minnesota acting by and through its Attorney General;

2. *"Blue Cross"* means BCBSM, Inc., d/b/a Blue Cross and Blue Shield of Minnesota, and all of its administrators, representatives, employees, directors, officers, agents, attorneys, parents and divisions;

3. *"Settling Defendants"* means those Defendants in this action that are signatories hereto;

4. *"Defendants"* means Philip Mortis Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, B.A.T Industries P.L.C., British-American Tobacco Company Limited, BAT (UK and Export) Limited, Lorillard Tobacco Company, The American Tobacco Company, The Council for Tobacco Research-U.S.A, Inc., and the Tobacco Institute, Inc. and their successors and assigns;

5. *"Consumer Price Index"* shall mean the Consumer Price Index for All Urban Consumers, for the most recent twelve-month period for which such

percentage information is available as published by the Bureau of Labor Statistics of the U.S. Department of Labor.

6. *"Court"* means the District Court of the State of Minnesota, County of Ramsey, Second Judicial District;

7. *"Market Share"* means a Settling Defendant's respective share of sales of cigarettes by unit for consumption in the United States during (i) with respect to payments made pursuant to Paragraph II.D. of this Settlement Agreement, the calendar year ending on the date on which the payment at issue is due, regardless of when such payment is made, and (ii) with respect to all other payments made pursuant to this Settlement Agreement, the calendar year immediately preceding the year in which the payment at issue is due, regardless of when such payment is made;

8. *"Cigarettes"* means any product which contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains (i) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (ii) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (iii) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (i) of this paragraph;

9. *"Smokeless Tobacco"* means any powder that consists of cut, ground, powdered, or leaf tobacco that contains nicotine and that is intended to be placed in the oral cavity;

10. *"Tobacco Products"* means Cigarettes and Smokeless Tobacco;

11. *"Billboards"* includes billboards, as well as all signs and placards in arenas and stadiums, whether open-air or enclosed. "Billboards" does not include (1) any advertisements placed on or outside the premises of retail establishments which sell tobacco products, or any retail point-of-sale; and (2) billboards or advertisements in connection with the sponsorship by the Defendants of any entertainment, sporting or similar event, such as NASCAR, that appears in the State of Minnesota as part of a national or multi-state tour;

12. *"Children"* or *"youth"* means persons under the age of 18;

13. *"Depository,"* unless otherwise specified, means the Minnesota document depository established by the Court's Order dated June 16, 1995. "Depositories" includes both the Minnesota depository and the Guildford, U.K. document depository established by the Court's Order dated September 6, 1995;

14. *"Transit Advertisements"* means advertising on private or public vehicles and all advertisements placed at, on or within any bus stop, taxi stand, waiting area, train station, airport or any similar location. *"Transit Advertisements"* does not include any advertisements placed on or outside the premises of retail establishments licensed to sell Tobacco Products or any retail point-of-sale;

15. *"Special State Counsel"* means Robins, Kaplan, Miller & Ciresi L.L.P. or a successor, if any; and

16. *"Final Approval"* means the date on which this Settlement Agreement and the form of State Escrow Agreement are approved by the Court. At the time of such approval, the settlement between the parties is final.

II. SETTLEMENT PAYMENTS

A. Settlement Receipts. The payments to be made by the Settling Defendants under this Settlement Agreement are in satisfaction of all of the State of Minnesota's claims for damages incurred by the State in the year of such payment or earlier years related to the subject matter of this action, including, without limitation, claims for equitable and injunctive relief, claims for health care expenditures and claims for punitive damages, except that no part of any payment under this Settlement Agreement is made in settlement of an actual or potential liability for a fine, penalty (civil or criminal) or enhanced damages.

B. Settlement Payments to the State of Minnesota. Each Settling Defendant severally shall cause to be paid to an account designated in writing by the State of Minnesota in accordance with and subject to paragraph II.E. of this Settlement Agreement, the following amounts: the amount listed for it in Schedule A hereto, such amount representing its share of $240,000,000, to be paid on or before September 5, 1998; pro rata in proportion to its Market Share, its share of $220,800,000, to be paid on or before January 4, 1999; pro rata in proportion to its Market Share, its share of $242,550,000, to be paid on or before January 3, 2000; pro rata in proportion to its Market Share, its share of $242,550,000, to be paid on or before January 2, 2001; pro rata in proportion to its Market Share, its share of $242,550,000, to be paid on or before January 2, 2002; and pro rata in proportion to its Market Share, its share of $121,550,000, to be paid on or before January 2, 2003. The payments made by the Settling Defendants pursuant to this Paragraph shall be adjusted upward by the greater of 3% or the Consumer Price Index applied each year on the previous year, beginning with the payment due to be made on or before January 3, 2000. The payments due to be made by the Settling Defendants pursuant to this Paragraph on or before

January 3, 2000, on or before January 2, 2001, on or before January 2, 2002, and on or before January 2, 2003, will also be decreased or increased, as the case may be, in accordance with the formula for adjustments of payments as set forth in Appendix A. The payments due to be made by the Settling Defendants pursuant to this Paragraph on or before September 5, 1998, and on or before January 4, 1999, shall not be subject to inflation escalation and volume adjustments described in the preceding sentences.

In the event that any of the Settling Defendants fails to make any payment required of it pursuant to this Paragraph (a "Defaulting Defendant") by the applicable date set forth in this paragraph II.B. (a "Missed Payment"), the State of Minnesota shall provide notice to each of the Settling Defendants of such non-payment. The Defaulting Defendant shall have 15 days after receipt of such notice to pay the Missed Payment, together with interest accrued from the original applicable due date at the prime rate as published in the Wall Street Journal on the latest publication date on or before the date of default plus 3%. If the Defaulting Defendant does not make such payment within such 15-day period, the State of Minnesota shall provide notice to each of the Settling Defendants of such continued non-payment. Any or all of the Settling Defendants (other than the Defaulting Defendant) shall thereafter have 15 days after receipt of such notice to elect (in such Settling Defendant's or such Settling Defendants' sole and absolute discretion) to pay the Missed Payment, together with interest accrued from the original applicable due date at the prime rate as published in the Wall Street Journal on the latest publication date on or before the date of default plus 3%. In the event that the State of Minnesota does not receive the Missed Payment, together with such accrued interest, within such additional 15-day period, all payments required to be made by each of the respective Settling Defendants pursuant to this Paragraph shall at the end of such additional 15-day period be

accelerated and shall immediately become due and owing to the State of Minnesota from each Settling Defendant pro rata in proportion to its Market Share; provided, however, that any such accelerated payments (a) shall all be adjusted upward by the greater of (i) the rate of 3% per annum or (ii) the actual total percent change in the CPI, in either instance for the period between January 1 of the year in which the acceleration of payments pursuant to this Paragraph occurs and the date on which such accelerated payments are due pursuant to this subsection, and (b) shall all immediately be adjusted in accordance with the formula for adjustments of payments set forth in Appendix A.

Nothing in this Paragraph shall be deemed under any circumstance to create any obligation on the part of any Settling Defendant to pay any amount owed or payable to the State of Minnesota by any other Settling Defendant. All obligations of the Settling Defendants pursuant to this Paragraph are intended to be and shall remain several, and not joint.

C. Public Health Foundation. The Attorney General will propose, and the Settling Defendants have agreed not to oppose, that the Legislature appropriate to a foundation one-half the payments due in September 1998, and in January of the years 1999 through 2003, to be used for such activities as the directors of the foundation may determine will diminish the human and economic consequences of tobacco use. It is contemplated that the directors of the foundation will include public representatives, and representatives of such groups as the American Lung Association, Minnesota Chapter, the University of Minnesota School of Public Health; the Minnesota SmokeFree 2000 Coalition; the American Cancer Society, Minnesota Division; the American Heart Association, Minnesota Chapter, the Association for Non-Smokers' Rights--Minnesota; and the Mayo Clinic Nicotine Dependence Center.

D. Annual Payments. Each of the Settling Defendants agrees that, beginning on December 31, 1998, and annually thereafter on December 31st of each year after 1998 (subject to final adjustment within 30 days), it shall severally cause to be paid to an account designated in writing by the State of Minnesota in accordance with and subject to paragraph 17.E. of this Settlement Agreement, pro rata in proportion to its respective Market Share, its share of 2.55% of the following amounts (in billions):

Year	1998	1999	2000	2001	2002	2003	there-after
	1	2	3	4	5	6	
Amount	$4B	$4.5B	$5B	$6.5B	$6.5B	$8B	$8B

The payments made by Settling Defendants pursuant to this Paragraph shall be adjusted upward by the greater of 3% or the Consumer Price Index applied each year on the previous year, beginning with the annual payment due on December 31, 1999. Such payments will also be decreased or increased, as the case may be, beginning with the annual payment due on December 31, 1999, in accordance with the formula for adjustments of payments set forth in Appendix A.

E. Payment of Settlement Proceeds. Any payment made pursuant to this Settlement Agreement shall be made to an account designated in writing by the State of Minnesota or the Court, as applicable; provided that after Final Approval, if the Court's approval is challenged by any third party, payments due to be made shall be paid into a special escrow account (the "State Escrow Account"), and held in escrow pursuant to this Section V.B. and the State Escrow Agreement.

F. Adjustments in Event of Federal Legislation. The enactment of federal tobacco-related legislation shall not affect the payments required by this Agreement except as follows:

1. If federal tobacco-related legislation providing for the resolution or other disposition of State Attorney General actions brought against tobacco companies is enacted on or before November 30, 2000, and if such legislation provides for payments) by tobacco companies (whether by settlement payment, tax or any other means), all or part of which is made available to States, the State of Minnesota shall elect to receive any funds that are (i) unrestricted as to their use, or (ii) are restricted to any form of health care or to any use related to tobacco (collectively "Federal Settlement Funds"), and Settling Defendants shall receive a dollar-for-dollar offset up to the full amount of payments required under Section II.D of this Agreement for any and all Settlement Funds received by the State of Minnesota, until all Federal Settlement Funds provided however:

a. There shall be no offset to payments required by this Agreement on account of any federal program, subsidies, payments, credits or other aid to the State which are not conditioned or tied to the settlement of a state tobacco-related suit or the relinquishment of state tobacco-related claims;

b. The State relinquishes no rights or benefits under this Agreement except for payments subject to the offset;

c. There are no federally imposed preconditions to the receipt of Federal Settlement Funds other than (i) the settlement of any state tobacco-related lawsuit or the relinquishment of state tobacco-related claims, (ii) actions or expenditures related to tobacco, including but not limited to, education, cessation, control or enforcement, or (iii) actions or expenditures related to health care;

d. If Settling Defendants enter into any pre-verdict settlement agreement (subsequent to the date of this Agreement) of similar litigation brought by a

nonfederal governmental plaintiff which does not require such an offset, this Section is null and void;

e. If Settling Defendants enter into any pre-verdict settlement agreement (subsequent to the date of this Agreement) of similar litigation brought by a non-federal governmental plaintiff which has an offset term more favorable to the plaintiff, this Settlement Agreement shall, at the option of the Office of the Attorney General of the State of Minnesota, be revised to include a comparable term.

2. Nothing in this section is intended to or shall reduce the total amounts payable to the State under this Agreement by Settling Defendants beyond the amount of Federal Settlement Funds actually received by the State of Minnesota.

III. DISMISSAL OF CLAIMS AND RELEASES

A. State of Minnesota's Dismissal of Claims. Upon approval of this Settlement Agreement by the Court, the Court shall enter a Final Judgment dismissing with prejudice all claims as to all Defendants.

This Agreement resolves all claims between the State and the Defendants, except for issues pending before the court pertaining to the discoverability or production of documents for which the Defendants reserve their rights of appeal.

B. State of Minnesota's Release and Discharge. Upon Final Approval, the State of Minnesota shall release and forever discharge all Defendants and their present and former parents, subsidiaries (whether or not wholly owned) and affiliates, and their respective divisions, organizational units, officers, directors, employees, representatives, insurers, suppliers, agents, attorneys and distributors (and the predecessors, heirs, executors, administrators, successors and assigns of each of the foregoing) from any and all manner of civil claims, demands, actions, suits and causes of action,

damages whenever incurred; liabilities of any nature whatsoever, including civil penalties, as well as costs, expenses and attorneys' fees, known or unknown, suspected or unsuspected, accrued or unaccrued, whether legal, equitable or statutory ("Claims") that the State of Minnesota (including any of its past, present or future administrators, representatives, employees, officers, attorneys, agents, representatives, officials acting in their official capacities, agencies, departments, commissions, and divisions, and whether or not any such person or entity participates in the settlement), whether directly, indirectly, representatively, derivatively or in any other capacity, ever had, now has or hereafter can, shall or may have, as follows:

a. for past conduct, as to any Claims relating to the subject matter of this action which have been asserted or could be asserted now or in the future in this action or a comparable Federal action by the State; and

b. for future conduct, only as to monetary Claims directly or indirectly based on, arising out of or in any way related to, in whole or in part, the use of or exposure to Tobacco Products manufactured in the ordinary course of business, including without limitation any future claims for reimbursement for health care costs allegedly associated with use of or exposure to Tobacco Products;

(such past and future Claims hereinafter referred to as the "Released Claims"); provided, however, that the foregoing shall not operate as a release of any person, party or entity (whether or not a signatory to this Agreement) as to any of the obligations undertaken in this Agreement in connection with a monetary breach or default of this Agreement.

The State of Minnesota hereby covenants and agrees that it shall not hereafter sue or seek to establish civil liability against any person or entity covered by the release provided under Paragraph III.B based, in whole or in part, upon any of

the Released Claims, and the State of Minnesota agrees that this covenant and agreement shall be a complete defense to any such civil action or proceeding.

C. Settling Defendants' Release and Discharge. Upon Final Approval, Settling Defendants shall release and forever discharge the State of Minnesota (including any of its past, present or future administrators, representatives, employees, officers, attorneys, agents, representatives, officials acting in their official capacities, agencies, departments, commissions, and divisions, and whether or not any such person or entity participates in the settlement) from any and all manner of civil claims, demands, actions, suits and causes of action, damages whenever incurred, liabilities of any nature whatsoever, including costs, expenses, penalties and attorneys' fees, known or unknown, suspected or unsuspected, accrued or unaccrued, whether legal, equitable or statutory, arising out of or in any way related to, in whole or in part, the subject matter of the litigation of this lawsuit, that Settling Defendants (including any of their present and former parents, subsidiaries, divisions, affiliates, officers, directors, employees, witnesses (fact or expert), representatives, insurers, agents, attorneys and distributors and the predecessors, hems, executors, administrators, successors and assigns of each of the foregoing, and whether or not any such person participates in the settlement), whether directly, indirectly, representatively, derivatively or in any other capacity, ever had, now has or hereafter can, shall or may have.

D. Limited Most-Favored Nation Provision. In partial consideration for the monetary payments to be made by the Settling Defendants pursuant to this Settlement Agreement, the State of Minnesota agrees that if the Settling Defendants enter into any future pre-verdict settlement agreement of other similar litigation brought by a non-federal governmental plaintiff on terms more favorable to such non-federal governmental plaintiff than the terms of this Settlement

Agreement (after due consideration of relevant differences in population or other appropriate factors), the terms of this Settlement Agreement shall not be revised except as follows: to the extent, if any, such other pre-verdict settlement agreement includes teems that provide (a) for joint and several liability among the Settling Defendants with respect to monetary payments to be made pursuant to such agreement; (b) a guarantee by the parent company of any of the Settling Defendants or other assurances of payment or creditors' remedies with respect to monetary payments to be made pursuant to such agreement; or (c) for the implementation of non-economic tobacco-related public health measures different from those contained in this Settlement-- Agreement, then this Settlement Agreement shall, at the option of the Office of the Attorney General of the State of Minnesota, be revised to include terms comparable to such terms.

IV. DEFENDANTS' ASSURANCES

A. Settling Defendants agree not to directly or indirectly, including through any third party or affiliate:

1. Oppose the passage of those future Minnesota legislative proposals or administrative rules intended by their terms to reduce tobacco use by children listed on Schedule B. (The foregoing does not prohibit Settling Defendants from resisting enforcement of, or suing for declaratory or injunctive relief with respect to any such legislation or rule on any grounds.)

2. Facially challenge the enforceability or constitutionality of existing Minnesota laws or rules relating to tobacco control, including, but not limited to, Minnesota Statutes Section 461.17 regarding the disclosure of certain ingredients in cigarettes; Minnesota Statutes Sections 461.12, et. seq., and 609.685 regarding the sale of tobacco to minors; Minnesota Statutes Section

325F.77 regarding the distribution of samples; and Minnesota Statutes Section 144.411 et. seq. regarding clean indoor air.

3. Support in Congress or any forum, legislation, rules or policies which would preempt, override, or abrogate or diminish the State's rights or recoveries under this Agreement. Except as specifically provided in the foregoing sentence, nothing in this Agreement shall be deemed to restrain the parties from advocating terms of any national settlement or taking any other positions on issues relating to tobacco. The State and its attorneys specifically reserve the right to continue to litigate or advocate for additional document disclosure beyond that ordered by the Ramsey County District Court, in any forum outside of Minnesota.

4. Settling Defendants' obligation to produce documents in discovery pertaining to enactment or repeal of, or opposition to, state legislation or state executive action relating to tobacco in Minnesota is extended beyond August 17, 1994, to the date of this Agreement, with Settling Defendants required to produce these documents within thirty (30) days of the date of this Agreement.

B. Disclosure of Payments Likely to Affect Public Policy.

1. Each Settling Defendant shall disclose to the Office of the Attorney General and the Office of the Governor, at the times and in the manner provided below, information about the following payments:

a. Any payment to a "lobbyist" or "principal" within the meaning of Minnesota Statutes, Section 10A.01, subdivisions 11 and 28, if Settling Defendant knows or has reason to know that the payment will be used, directly or indirectly, to influence legislative or administrative action, or the official action of state or local government in Minnesota in any way relating to Tobacco Products or their use.

b. Any payment to a third party, if the Settling Defendant knows the payment is partly in consideration for the third party attending, offering testimony at, or participating before a state or local government hearing in Minnesota in any way relating to Tobacco Products or their use; and

c. Any payment (other than a "political contribution" under Minn. Stat. § 10.01, subd. 7, or 2 USC § 431(8)(A)) to, or for the benefit of, a state or local official in Minnesota, whether made directly by a defendant or indirectly through an employee acting in the scope of his employment, affiliate, lobbyist, or other agent acting under the substantial control of a defendant.

2. Disclosures required under this section shall be filed with the Office of the Attorney General and with the Office of the Governor on the first day of January, April, July and October of each year for any and all payments made through the first day of the previous month and shall be transmitted in electronic format or such format as the attorney general may require, with the following information:

a. The name, address, telephone number and e-mail address of the recipient.

b. The amount of each payment described in Paragraph B(1).

c. The aggregate amount of all payments described in Paragraph B(1) to the recipient in the calendar year.

3. Information filed under this section is "public data" within the meaning of the Minnesota Government Data Practices Act.

C. Settling Defendants agree to discontinue all Billboards and Transit Advertisements of Tobacco Products in the State. Settling Defendants shall use their best efforts in cooperation with the State to identify all such Billboards that are located within 1000 feet of any public or private school or playground in the State, and shall provide the State with a preliminary list of the location of all Billboards and stationary

Transit Advertisements within 30 days from the date hereof, such list to be finalized within an additional 15 days. Settling Defendants shall, at the earlier of the expiration of applicable contracts or four months from the date the final list is supplied to the State, remove all Billboards and Transit Advertisements for Tobacco Products from within the State, leaving the space unused or used for advertising unrelated to Tobacco Products; or at the option of the State of Minnesota, will allow the State, at its expense, to substitute for the remaining term of the contract, alternative advertising intended to discourage the use of Tobacco Products by children and their exposure to second-hand smoke. The parties also agree to segue the expedited removal of up to 50 Billboards or stationary Transit Advertisements for Tobacco Products designated by the State within 30 days after their designation. Each Settling Defendant which has Billboard advertising in the State shall provide the Court and the Attorney General, or his designee, with the name of a contact person to whom the State may direct inquiries during the time such Billboards and Transit Advertisements are being eliminated, from whom the State may obtain periodic reports as to the progress of their elimination and who will be responsible for ensuring that appropriate action is taken to remove any Billboards that have not been timely eliminated.

D. Settling Defendants shall not make, in the connection with any motion picture made in the United States, or cause to be made any payment, direct or indirect, to any person to use, display, make reference to, or use as a prop any cigarette, cigarette package, advertisement for cigarettes, or nay other item bearing the brand name, logo, symbol, motto, selling message, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of domestic tobacco products.

E. On and after December 31, 1998, Settling Defendants shall permanently cease marketing, licensing,

distributing, selling or offering, directly or indirectly, including by catalogue or direct mail, in the State of Minnesota, any service or item (other than tobacco products or any item of which the sole function is to advertise tobacco products) which bears the brand name (alone or in conjunction with any other word), logo, symbol, motto, selling message, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of domestic tobacco products.

F. Settling Defendants and the Law Firm of Robins, Kaplan, Miller & Ciresi L.L.P. ("RKM&C") have reached a separate agreement for the payment of the State's costs and attorneys fees. In consideration for said agreement, RKM&C has released the State from its obligation to pay costs and attorneys fees under the Special Attorney Appointment dated May 23, 1994.

V. MISCELLANEOUS PROVISIONS

A. Representations of Parties. The respective parties hereto hereby represent that this Settlement Agreement has been duly authorized and, upon execution, will constitute a valid and binding contractual obligation, enforceable in accordance with its terms, of each of the parties hereto. The State represents that all of its outside counsel that have represented it in this action are, by and through their authorized representatives, signatores to this Settlement Agreement.

B. Court Approval. The Parties agree to submit this Settlement Agreement to the Court for its review and approval on Friday, May 8, 1998. If the Court declines to approve this Settlement Agreement, the Blue Cross Settlement Agreement, the form of State Escrow Agreement, and the form of Blue Cross Escrow Agreement, the matter will be immediately submitted to the jury. If the Court, as a

condition of approval or otherwise, requires any change in the Agreements which any signatory is unwilling to make, the case will be immediately submitted to the jury. If before the Court approves the Agreements, any third-party seeks to intervene for the purpose of opposing the Settlement Agreement, the Blue Cross Settlement Agreement, the State Escrow Agreement, and the Blue Cross Escrow Agreement, any Party at its sole election, may withdraw from this Agreement, after first giving notice to the Court and all of the Parties before the jury is dismissed, and submit the case to the jury. If the Court approves the Settlement Agreement as submitted, the Agreement will be final and binding upon all Parties.

In the event that there is a challenge to any provision of this Settlement Agreement by anyone other than the Attorney General of the State of Minnesota as of the date of this Agreement, BCBS or Settling Defendants ("a third-party challenge") after Final Approval, any amounts required to be paid by Settling Defendants pursuant to this Settlement Agreement shall be paid into escrow pursuant to the State Escrow Agreement. If, as a result of such a challenge, any material term of Sections II, III, IV of this Settlement Agreement is modified or rendered unenforceable, the parties shall negotiate an equivalent or comparable substitute term or other appropriate credit or adjustment. In the event that the parties are unable to agree on such a substitute term or appropriate credit or adjustment, then the parties will submit the issue to the Court for resolution, subject to any available appeal rights. In the event that any third-patty challenge is made after December 31, 1998, any payments due under Paragraph II.B. shall be made to the State according to the terms of this Settlement Agreement, and only those payments due under Paragraph II.D. shall be placed into escrow as provided above.

In the event that the Court determines that there has been a failure of consideration legally sufficient to warrant

termination of this Settlement Agreement, then this Settlement Agreement may be terminated by the party adversely affected. In the event of such termination, the action will be reinstated and all decisions of the trial court, and any party's appeal or other rights with respect thereto, will have the same force and effect as if this Settlement Agreement had never been entered into.

C. Obligations Several, Not Joint. All obligations of the Settling Defendants pursuant to this Settlement Agreement are intended to be and shall remain several, and not joint.

D. Headings. The headings of the paragraphs of this Settlement Agreement are not binding and are for reference only and do not limit, expand or otherwise affect the contents of this Settlement Agreement.

E. No Determination or Admission. This Settlement Agreement and any proceedings taken hereunder are not intended to be and shall not in any event be construed as, or deemed to be, an admission or concession or evidence of any liability or any wrongdoing whatsoever on the part of any party hereto or any person covered by the releases provided under paragraphs III.B. and C. hereof. The Settling Defendants specifically disclaim and deny any liability or wrongdoing whatsoever with respect to the allegations and claims asserted against them in this action and enter into this Settlement Agreement solely to avoid the further expense, inconvenience, burden and uncertainty of litigation.

F. Non-Admissibility. The settlement negotiations resulting in this Settlement Agreement have been undertaken by the parties hereto in good faith and for settlement purposes only, and neither this Settlement Agreement nor any evidence of negotiations hereunder shall be offered or received in evidence in this action, or any other action or proceeding, for any purpose other than in an action or proceeding arising under this Settlement Agreement.

G. Amendment; Waiver. This Settlement Agreement may be amended only by a written instrument executed by the

Attorney General and the Settling Defendants. The waiver of any rights conferred hereunder shall be effective only if made by written instrument executed by the waiving party. The waiver by any party of any breach of this Settlement Agreement shall not be deemed to be or construed as a waiver of any other breach, whether prior, subsequent or contemporaneous, of this Settlement Agreement.

H. Notices. All notices or other communications to any party to this Settlement Agreement shall be in writing (and shall include telex, telecopy or similar writing) and shall be given to the respective parties hereto at the following addresses. Any party hereto may change the name and address of the person designated to receive notice on behalf of such party by notice given as provided in this paragraph.

For the State of Minnesota:

Hubert H. Humphrey III
Attorney General
102 State Capitol
St. Paul, MN 55155
Fax: 612.297.4193

with copies to:

Michael V. Ciresi
Robins, Kaplan, Miller & Ciresi L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
Fax: 612.339.4181

Chief Deputy Attorney General
State of Minnesota
102 State Capitol
St. Paul, MN 55155

Fax: 612.297.4193

For Philip Morris Incorporated:

Martin J. Barrington
Philip Morris incorporated
120 Park Avenue
New York, NY 10017-5592
Fax: 212.907.5399

With a copy to:

Meyer G. Koplow
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019
Fax: 212.403.2000

For R.J. Reynolds Tobacco Company:

Charles A. Blixt
General Counsel
R.J. Reynolds Tobacco Company
401 North Main Street
Winston-Salem, NC 27102
Fax: 910.741.2998

With a copy to:

Arthur F. Golden
Davis Polk & Wardwell
450 Lexington Avenue
New York, NY 10017
Fax: 212.450.4800

For Brown & Williamson Tobacco Corporation:

F. Anthony Burke
Brown & Williamson Tobacco Corporation
200 Brown & Williamson Tower
401 South Fourth Avenue
Louisville, KY 40202
Fax: 502.568.7297

With a copy to:

Stephen R Patton
Kirkland & Ellis
200 East Randolph Dr.
Chicago, IL 60601
Fax: 312.861.2200

For Lorillard Tobacco Company:

Arthur J. Stevens
Lorillard Tobacco Company
714 Green Valley Road
Greensboro, NC 27408
Fax: 910.335.7707

I. Cooperation. The parties hereto agree to use their best efforts and to cooperate with each other to cause this Settlement Agreement to become effective, to obtain all necessary approvals, consents and authorizations, if any, and to execute all documents and to take such other action as may be appropriate in connection therewith. Consistent with the foregoing, the parties hereto agree that they will not directly or indirectly assist or encourage any challenge to this Settlement Agreement by any other person. All parties hereto agree to support the integrity and enforcement of the terms of this Settlement Agreement.

J. Governing Law. This Settlement Agreement shall be governed by the laws of the State of Minnesota, without regard to the conflicts of law rules of such state.

K. Construction. None of the parties hereto shall be considered to be the drafter of this Settlement Agreement or any provision hereof for the purpose of any statute, case law or rule of interpretation or construction that would or might cause any provision to be construed against the drafter hereof.

L. Severability. Subject to the provisions of Paragraph V.B., the terms of this Agreement are severable. If any term of this Agreement is found to be unlawful, the remaining terms shall remain in full force and effect, and the parties agree to negotiate a substitute term of equivalent value.

M. Intended Beneficiaries. This action was brought by the State of Minnesota, through its Attorney General, and by Blue Cross to recover certain monies and to promote the health and welfare of the people of Minnesota. No portion of this Settlement Agreement shall provide any rights to, or be enforceable by, any person or entity that is neither a party hereto nor a person encompassed by the releases provided in paragraphs III.B. and C. of this Settlement Agreement. Except as expressly provided in this Settlement Agreement, no portion of this Settlement Agreement shall bind any non-party or determine, limit or prejudice the rights of any such person or entity. None of the rights granted or obligations assumed under this Settlement Agreement by the parties hereto may be assigned or otherwise conveyed without the express prior written consent of all of the parties hereto.

N. Counterparts. This Settlement Agreement may be executed in counterparts. Facsimile or photocopied signatures shall be considered as valid signatures as of the date hereof, although the original signature pages shall thereafter be appended to this Settlement Agreement.

IN WITNESS WHEREOF, the parties hereto, through their fully authorized representatives, have agreed to this

Comprehensive Settlement Agreement and Release as of this 8th day of May, 1998.

STATE OF MINNESOTA, acting by and through Hubert H. Humphrey III, its duly elected and authorized Attorney General

By: s/_____
Hubert H. Humphrey III
Attorney General

s/_____
Lee E. Sheehy
Chief Deputy Attorney General

s/_____
Eric A. Johnson
Executive Assistant to the Attorney General

s/_____
Thomas F. Pursell
Senior Counsel to the Attorney General

s/_____
D. Douglas Blanke
Director of Consumer Policy

COUNSEL TO THE STATE OF MINNESOTA

By: s/_____
Michael V. Ciresi
Robins, Kaplan, Miller & Ciresi L.L.P.

PHILIP MORRIS INCORPORATED

By: s/
Meyer G. Koplow
Counsel

By: s/
Martin J. Barrington
General Counsel

R.J. REYNOLDS TOBACCO COMPANY

By: s/
D. Scott Wise
Counsel

By: s/
Charles A. Blixt
General Counsel

BROWN & WILLIAMSON TOBACCO CORPORATION

By: s/
Stephen R. Patton
Counsel

By: s/
F. Anthony Burke
Vice President and General Counsel

LORILLARD TOBACCO COMPANY

By: s/
Arthur J. Stevens
Senior Vice President & General Counsel

SCHEDULE A

AMOUNTS PAYABLE BY SETTLING DEFENDANTS ON OR BEFORE SEPTEMBER 5,1998 PURSUANT TO PARAGRAPH II.B. OF THE SETTLEMENT AGREEMENT

Date	9/5/98
Settling Defendants	
Philip Morris Incorporated	$163,200,000
R.J. Reynolds Tobacco Company	$ 16,320,000
Brown & Williamson Tobacco Corporation	$ 42,960,000
Lorillard Tobacco Company	$ 17,520,000
Total Amount	**$240,000,000**

SCHEDULE B

Potential Future Legislation to Reduce Tobacco Use by Children

- Legislation to expand the self-service-sale restrictions of the youth access to tobacco law and to remove the current exception for sales of cigars.

- Legislation to clarify the current youth access law provision on vending machines, making clear that machines equipped with automatic locks or that use tokens are vending machines within the meaning of the law.

- Legislation providing enhanced or coordinated funding for enforcement efforts under sales-to-minors provisions of the criminal code or the youth access statute and ordinances.

- Legislation to encourage or support the use of technology to increase effectiveness of age-of-purchase laws, such as, without limitation, the use of programmable scanners or scanners to read drivers' licenses.

- Legislation or rules restricting the wearing, carrying or display of tobacco indicia in school-related settings, including, without limitation, in school facilities, on school premises, or in connection with school-sponsored activities.

- Legislation to create or stiffen non-monetary incentives for youth not to smoke, such as expansion of youth community service programs.

APPENDIX A

FORMULA FOR CALCULATING

STATE OF MINNESOTA VOLUME ADJUSTMENTS

Any payment that by the terms of the Settlement Agreement is to be adjusted pursuant to this Appendix (the "Applicable Base Payment") shall be adjusted pursuant to this Appendix in the following manner:

(A) in the event the aggregate number of units of Tobacco Products sold domestically by the Settling Defendants in the Applicable Year (as defined hereinbelow) (the "Actual Volume") is greater than the aggregate number of units of Tobacco Products sold domestically by the Settling Defendants in 1997 (the "Base Volume"), the Applicable Base Payment shall be multiplied by the ratio of the Actual Volume to the Base Volume;

(B) in the event the Actual Volume is less than the Base Volume,

(i) the Applicable Base Payment shall be multiplied by the ratio of the Actual Volume to the Base Volume, and the resulting product shall be divided by 0.98; and

(ii) if a reduction of the Applicable Base Payment results from the application of subparagraph (B)(i) of this Appendix, but the Settling Defendants' aggregate net operating profits from domestic sales of Tobacco Products for the Applicable Year (the "Actual Net Operating Profit") is greater than the Settling Defendants' aggregate net operating profits

from domestic sales of Tobacco Products in 1997 (the "Base Net Operating Profit") (such Base Net Operating Profit being adjusted upward by the greater of the rate of 3% per annum or the actual total percent change in the Consumer Price Index, in either instance for the period between January 1, 1998 and the date on which the payment at issue is made), then the amount by which the Applicable Base Payment is reduced by the application of subparagraph (B)(i) shall be reduced (but not below zero) by 2.55% of 25% of such increase in such profits. For purposes of this Appendix, "net operating profits from domestic sales of Tobacco Products" shall mean net operating profits from domestic sales of Tobacco Products as reported to the United States Securities and Exchange Commission ("SEC") for the Applicable Year or, in the case of a Settling Defendant that does not report profits to the SEC, as reported in financial statements prepared in accordance with generally accepted accounting principles and audited by a nationally recognized accounting firm. The determination of the Settling Defendants' aggregate net operating profits from domestic sales of Tobacco Products shall be derived using the same methodology as was employed in deriving such Settling Defendants' aggregate net operating profits from domestic sales of Tobacco Products in 1997. Any increase in an Applicable Base Payment pursuant to this subparagraph B(ii) shall be payable within 120 days after the date that the payment at issue was required to be made.

(C) "Applicable Year" means (i) with respect to the payments made pursuant to paragraph II.D of the Settlement Agreement, the calendar year ending on the

date on which the payment at issue is due, regardless of when such payment is made; and (ii) with respect to all other payments made pursuant to this Settlement Agreement, the calendar year immediately preceding the year in which the payment at issue is due, regardless of when such payment is made.

state of Minnesota
County of Ramsey

LEE E SHEEHY
.02 STATE CAPITOL
ST PAUL MN 55155-1002

Case Title: TOBACCO LITIGATION((

Dated: May 19, 1998 By:

Court Administrator

Minnesota Attorney General Website Press Release

5/8/98
Minnesota's Tobacco Settlement MONEY

Money Sought by the state vs. money paid

Money sought: $1.31 billion
Money paid: $6.17 billion

How Does Minnesota's Settlement Compare with Settlements in Other States?

Minnesota's settlement recovers:

- Nearly 2 times the amount paid to settle in Texas per state resident in today's dollars
- Nearly twice the amount paid in Florida per state resident in today's dollars
- Over 20 percent more than Mississippi's settlement per state resident in today's dollars

$6.17 Billion Dollar Payment Schedule

June 1998	$10 Million
September 1998	$240 Million
December 1998	$102 Million
January 1999	$220.8 Million
June 1999	$10 Million
December 1999	$114.75 Million
January 2000	$242.5 Million
June 2000	$10 Million
December 2000	$127.5 Million
January 2001	$242.5 Million
June 2001	$10 Million
December 2001	$165.75 Million

January 2002	$242.5 Million	
June 2002	$10 Million	
December 2002	$165.75 Million	
January 2003	$121.5 Million	
Every June from 2003-2007		$10 Million
Every December from 2003-2023		$204 Million
Every December Thereafter		$204 Million

Notes:
1. Dollars are calculated in today's dollars (or present value) -- the value in today's dollars of the payments to be received over the next 25 years. These numbers are calculated at a 6.5% discount rate. 2. Payments made after January of 1999 (with the exception of the $10 million payments each January) will be raised 3% or by the national CFonsumer Price Index (CPI) for the previous year -- whichever is greater, and will be adjusted downward if profits go down due to falling sales.

Minnesota Attorney General Website Press Release

5/8/98

Minnesota's Tobacco Settlement An Overview

Largest Recovery in Minnesota History

Under the settlement, the tobacco industry will pay the State more than $6.1 billion over the next 25 years, making this the largest recovery in Minnesota history and the third largest in American history. In its lawsuit, the State had sought damages of $1.3 billion for the cost of treating smoking-related disease. The settlement is more than four and one-half times the amount sought in damages. The State's attorney's fees will be paid directly by the tobacco companies, on top of the State's recovery.

The Truth Comes Out

A paramount goal of Minnesota's litigation was to uncover the truth about the tobacco industry's forty-year conspiracy of lies. Through four years of bitter litigation, the State fought its way into the industry's secret documents. Now these hard-won documents will become public, in what former Surgeon General C. Everett Koop has called "one of the most significant public health achievements of the second half of the Twentieth Century." Thirty-three million pages of industry documents will be open to the public, along with the industry's computerized "roadmaps" to the documents. The industry will pay to maintain a public document center in Minnesota.

First-Ever Ban on Marketing to Kids

Under the settlement, the tobacco companies are specifically prohibited, by court order, from using any marketing techniques that target children. We are unaware of any comparable law or order anywhere. In the past, the only way

to stop tobacco companies from targeting children has been to argue that they are engaged in deceptive advertising or violation of other general laws. Now, for the first time, they will be bound by a specific, ironclad order. And the court will have the power to do whatever it takes to ensure compliance.

Cessation Options for Every Minnesota Smoker

The settlement provides for money to be set aside for a public smoking cessation fund, to be supervised by public health experts. Under the settlement, more than $100 million will be earmarked for this fund, which will offer a publicly-funded stop-smoking treatment opportunity for every Minnesota smoker who wants to quit. This fund is unprecedented.

The World's Best Tobacco Control Program

Under the settlement plan, a non-profit foundation, run by a board of directors drawn mainly from prominent public health groups, will develop the world's largest and most comprehensive program to reduce teen smoking and combat the social and economic harm caused by tobacco. Subject to the approval of the legislature, this foundation could receive a permanent endowment of more than $650 million. An additional $100 million will be paid by the industry for research to get at the roots of the tobacco epidemic. The interest on this endowment will fund a sustained counter-advertising campaign; classroom education; community partnerships; research; advocacy and innovative prevention programs. This will be the world's best-funded and, we hope, most effective campaign to save future generations from becoming addicted to the world's deadliest consumer product.

Tobacco Billboards Come Down

Cigarettes are the number one item advertised on billboards in Minnesota. But not for long. Under the settlement, all tobacco billboards come down. Fifty come down within a

month, and the remainder will be phased out in less than six months. Tobacco advertising on buses, bus shelters and taxis will also end.

No More Branded Merchandise

Tobacco companies spend almost $1 billion annually on T-shirts, hats, gym bags, backpacks, CD players and other merchandise with cigarette logos, making our children "walking billboards" for cigarettes. An amazing one-third of kids from 12 to 17 years old--including nonsmokers--own these items. New research shows that this promotional merchandise may be one of the most powerful influences in encouraging kids to smoke: children who own these items are four times more likely to start smoking than those who don't. More than 78 percent of Americans think this type of advertising should be stopped. Now it will be. Under the settlement, this distribution of branded merchandise and all branded promotional items, down to napkins and matchbooks, will be banned in Minnesota. This is unprecedented.

No More Secret Payoffs to Movie Producers—Nationwide

Some critics have questioned whether state legal cases can help force nationwide changes in the tobacco industry. This provision does just that. One of the most insidious tobacco marketing techniques has been the secret payment of fees to movie producers to feature cigarettes and smoking in popular films, sometimes in ways that showcase particular brands. The industry claims it discontinued this practice many years ago, but a document uncovered in the Minnesota case shows that Philip Morris provided products for use in movies as recent, and as youth-oriented, as "The Muppet Movie" and "Who Framed Roger Rabbit?" Speculation abounds about whether secret payoffs may have been made to the makers of such recent, smoking-intensive movies as "Titanic" and "My Best Friend's Wedding." Under this settlement, the companies are barred from making such payments, directly or

indirectly. In fact, it covers not only movies, but other entertainment media as well, from music videos to computer games to live musical performances and television shows. Notably, this unprecedented provision applies nationwide, demonstrating that state litigation can contribute significantly to national solutions to the tobacco epidemic.

Tobacco Trade Group Must Disband

In its lawsuit, the State had alleged that the tobacco industry used its so-called "scientific research" arm, the "Council For Tobacco Research" (or CTR) as a tool in its conspiracy to mislead Americans and suppress research and development of safer cigarettes. The State alleged that this "research" effort provided the industry with "cover" by mounting costly and endless research tailored to avoid learning anything about the link between smoking and disease, and designed to perpetuate the myth that endless additional study was needed. Under the settlement, this trade group -- the industry's so-called "scientific" arm, is dissolved and all its health research forwarded to the FDA. The industry is permanently barred from reviving the CTR or anything similar.

Expanded Lobbying Disclosure

The tobacco industry is notorious for manipulating the political process and wielding its considerable clout through front-groups, highly paid lobbyists and secret surrogates. The settlement imposes new disclosure requirements on the industry, beyond those of Minnesota's lobbying and campaign finance laws, to shine the light of public scrutiny on the industry's efforts to influence Minnesota lawmaking. Among the enhanced disclosures will be requirements that the industry reveal the amounts paid to its lobbyists and to other associations; reveal payments made to third parties to testify in hearings, and so on; and report on the use of controlled foundations to make gifts that benefit Minnesota officials. This is unprecedented.

Protecting the Integrity of the Legislative Process

The settlement contains provisions that help preserve Minnesota's tobacco laws, and that limit the industry's ability to block future legislation. The industry is specifically prohibited from bringing any legal challenge against Minnesota's existing laws against selling tobacco to minors; the Clean Indoor Air Act; the law against distribution of free tobacco samples; or the new ingredient disclosure law adopted in 1997 and not yet implemented. In addition, the industry is barred from opposing future legislation to reduce tobacco use by children.

Minnesota Benefits From Achievements in Future Cases

The settlement allows Minnesota to receive the benefit of any health gains, injunctive language, or any other non-monetary tenors that may be achieved in any future settlements the industry negotiates with other states. This "most favored nation" clause also guarantees Minnesota's right to take advantage of any attractive public health or reform terms in any national tobacco legislation. In other words, no other state will receive more benefits than Minnesota does.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

---------- Case Type: Declaratory Judgment

JESSE LEE BROWN
and RONALD J. BERGERON, File No: 98-11152

on behalf of themselves and all others
similarly situated,

Plaintiffs,

vs.

THE STATE OF
MINNESOTA,

Defendant.

AMENDED CLASS ACTION COMPLAINT FOR DECLARATORY JUDGMENT PURSUANT TO CHAPTER 555 OF THE MINNESOTA STATUTES

Plaintiffs, on behalf of themselves and all other similarly situated, for their Complaint allege, upon information and belief as follows:

1. This is an action for a declaratory judgment brought pursuant to Minn. Stat. § 555.02 for the purpose of determining questions of an actual controversy between the parties related to the rights, status, or legal relations under two statutory provisions.

The Parties

2. Plaintiff Jesse Lee Brown was at all times relevant hereto a citizen of the City of Minneapolis, County of

Hennepin, State of Minnesota. At various times between January 1, 1978 and December 31, 1996, Jesse Lee Brown received treatment for smoking-related illnesses and ailments. Such treatment was paid for in whole or in part under Minnesota's Medicaid Plan, Medical Assistance, see Minn. Stat. § 256B.01, et seq. and 42 U.S.C. § 1396, et seq. (hereinafter "Medical Assistance"). The State limited its claim to that portion of Medical Assistance benefits that was paid for by the State.

3. Plaintiff Ronald J. Bergeron was at all times relevant hereto a citizen of the City of St. Paul, County of Ramsey, State of Minnesota. At various times between January 1, 1978 and December 31, 1996, Ronald J. Bergeron received treatment for smoking-related illnesses and ailments. Such treatment was paid for in whole or in part under the General Assistance Medical Care, Minn. Stat. § 256D.03, subd. 3 (hereinafter "General Assistance") and/or Medical Assistance.

4. Defendant State of Minnesota, by and through one of its political subdivisions, operates and administers the Medical Assistance Program, see Minn. Stat. § 256B.01, et seq. and 42 U.S.C. § 1396, et seq. Minnesota has determined that medical assistance for needy persons "is hereby declared to be a matter of State concern" and that to provide such care, "a state-wide program of medical assistance...is hereby established." Minn. Stat. § 256B.01. Under the Medical Assistance program, the State of Minnesota pays for medical services provided to program recipients.

5. Defendant State of Minnesota, by and through one of its political subdivisions, operates and administers the General Assistance Program, see Minn. Stat. § 256D.03, subd. 3. General Assistance Medical Care is available to qualifying persons who are not eligible for Medical Assistance. The State of Minnesota pays for the entire cost of this care.

Background Facts

6. In 1994, the State of Minnesota filed an action against members of the tobacco industry captioned, "The State of Minnesota, et al. v. Philip Morris Incorporated, et al.," venued in Ramsey County District Court, Court File Number C1-94-8565 (hereinafter "Tobacco Litigation"), seeking to recover money spent to treat recipients of Medical Assistance and General Assistance for smoking-related illnesses pursuant to Minn. Stat. § 256D.01, et seq. and Minn. Stat. § 256D.01, et seq.

7. The Tobacco Litigation Second Amended Complaint alleged relative to the State's Medical Assistance Program: "In fulfilling its statutory duties, the State of Minnesota has expended and will expend substantial sums of money due to the increased cost of providing health care services for treatment of smoking-caused diseases. These increased expenditures have been caused by the unlawful actions of the cigarette industry."

8. The Tobacco Litigation Second Amended Complaint alleged relative to the State's General Assistance Medical Program: "In fulfilling its statutory duties, the State of Minnesota has expended and will expend substantial sums of money due to the increased cost of providing health care services for treatment of smoking-caused diseases. These increased expenditures have been caused by the unlawful actions of the cigarette industry."

9. During the Tobacco trial, the State's experts and employees testified under oath that smoking causes disease, and their testimony was adopted by the State and formed the basis for the amounts recovered.

10. During the Tobacco trial, the State's experts and employees testified under oath that smoking caused disease among the Medical Assistance population during the time period of 1978 to 1996, and their testimony was adopted by the State and formed the basis for the amounts recovered.

11. During the Tobacco trial, the State's experts and employees testified under oath that smoking-related diseases among members of the class who were Medical Assistance recipients resulted in additional expenditures by the State to treat such diseases during the time period from 1978 to 1996, and their testimony was adopted by the State and formed the basis for the amounts recovered.

12. During the Tobacco trial, the State's experts and employees testified under oath that smoking caused disease among the General Assistance population during the time period of 1978 to 1996, and their testimony was adopted by the State and formed the basis for the amounts recovered.

13. During the Tobacco trial, the State's experts and employees testified under oath that smoking-related diseases among members of the class who were General Assistance recipients resulted in additional expenditures by the State to treat such diseases during the time period from 1978 to 1996, and their testimony was adopted by the State and formed the basis for the amounts recovered.

14. During the Tobacco trial, experts employed by the State testified under oath that they reviewed hundreds of millions of doctor's bill recórds to identify the class member Medical Assistance and General Assistance recipients who had been diagnosed and treated with a smoking-attributable disease, and their testimony was adopted by the State and formed the basis for the amounts recovered.

15. During the Tobacco trial, the State's employees and expert witnesses identified approximately 70,000 class member Medical Assistance and General Assistance recipients as having smoking-attributable expenditures, and their testimony was adopted by the State and formed the basis for the amounts recovered.

16. During the Tobacco trial, Dr. Jonathan Samet testified under oath that the class member Medical Assistance and General Assistance recipients identified as having smoking attributable diseases actually had those diseases, and

their testimony was adopted by the State and formed the basis for the amounts recovered.

17. During the Tobacco trial, the State's employees and expert witnesses testified under oath that the smoking-attributable expenditures for the State of Minnesota during the period from 1978 through 1996 is $1,310,000,000.00, and their testimony was adopted by the State and formed the basis for the amounts recovered.

18. The statistical model testified to under oath by the State's expert witnesses did not include any expenditures for treating smoking-attributable illnesses for MinnesotaCare recipients, and their testimony was adopted by the State and formed the basis for the amounts recovered.

19. The statistical model testified to under oath by the State's expert witnesses did not address any smoking-attributable expenditures that may have occurred among the State's employees except for a couple of years when State employees were covered by Blue Cross/Blue Shield-rated plans, and their testimony was adopted by the State and formed the basis for the amounts recovered.

CLASS ACTION ALLEGATIONS

20. Plaintiffs bring this action on behalf of themselves and, under Rule 23 of the Minnesota Rules of Civil Procedure, as representatives of the class defined herein.

A. The class consists of all persons who have received either Medical Assistance or General Assistance and who were treated for smoking-related diseases during the time period of 1978 through 1996, inclusive and further identified in the Tobacco Litigation.

B. The class is so numerous that joinder of all class members would be impracticable. Although the exact number of class members is presently unknown to plaintiffs, it is believed to be

approximately 70,000 persons. The class members are readily identifiable from records in the possession of the defendant and were identified for purposes of compiling the statistical model which formed the basis of the State's claims in the Tobacco Litigation.

C. Plaintiffs will fairly and adequately protect the interests of the class. The interests of the plaintiffs are coincident with, and not antagonistic to, those of the class. In addition, plaintiffs are represented by counsel who are experienced and competent in the prosecution of complex and class action litigation.

D. Questions of law and fact common to the members of the class predominate over questions which may affect only individual members, if any, in that defendant has acted on grounds generally applicable to the entire class. Among the questions of law and fact common to the fact are: the class members' rights pursuant to Minn. Stat. § 256D.042, subd. 5; the class members' rights pursuant to Minn. Stat. § 256D.03, subd. 8(f); the appropriate type or measure of damages; and whether plaintiffs and class members are entitled to declaratory relief.

E. These common questions of law and fact predominate over questions, if any, individual to particular class members. Class action treatment is superior to alternatives, if any, for the fair and efficient adjudication of the controversy described herein, because it permits a large number of injured persons to prosecute their common claims in a single forum simultaneously, efficiently, and without unnecessary duplication of evidence and effort. Class action treatment also permits the

adjudication of claims by smaller class members, who could not afford to individually litigate claims against the State. The class members are readily identifiable from information in the hands of the defendant. The class description is similar to that of classes approved in other cases, and the class size will not present unusual problems of management or notice.

F. Defendants have acted on grounds generally applicable to the class, thereby making final declaratory relief appropriate with respect to the class as a whole.

COUNT 1
DECLARATORY JUDGMENT AS TO RIGHTS, DUTIES, AND OBLIGATIONS PURSUANT TO MINN. STAT. § 256B.01 et seq.

21. Plaintiffs incorporate by reference the averments in paragraphs 1 through 20 above.

22. Minn. Stat. § 256B.01 et seq. authorizes two methods by which the State can seek to recover the amounts paid on behalf of Medical Assistance recipients from third parties liable for the illnesses or injuries necessitating the recipient's medical services, and establishes the rights of the injured Medical Assistance recipient should the State succeed in collecting such sums.

23. Minn. Stat. § 256D.042, subd. 1 provides that a lien shall automatically arise in favor of the State for the cost of medical services provided to Medical Assistance recipients: "When the state agency provides, pays for, or becomes liable for medical care, it shall have a lien for the cost of the care upon any and all causes of action . . . which accrue to the person to whom the care was furnished . . . as a result of the illness or injuries which necessitated the medical care."

24. Minn. Stat. § 256B.042, subd. 3 authorizes the attorney general to initiate a direct, independent action "against a person, firm, or corporation that may be liable to the person to whom the care was furnished."

25. Minn. Stat. § 256B.042, subd. 5 establishes the Medical Assistance recipient's right to a portion of the money recovered by the State in its third party action: "Upon any judgment, award, or settlement of a cause of action, or any part of it, upon which the State agency has filed its lien, including compensation for liquidated, unliquidated, or other damages, reasonable costs of collection, including attorney fees, must be deducted first. The full amount of medical assistance paid to or on behalf of the person as a result of the injury must be deducted next, and paid to the State agency. The rest must be paid to the medical assistance recipient or other plaintiff. The plaintiff, however, must receive at least one-third of the net recovery after attorney fees and other collection costs."

26. In addition to the State's statutory lien interest, Minn. Stat. § 256B.37, subd. 1 provides that when medical services are directed to a recipient who "has a cause of action arising out of an occurrence that necessitated the payment of medical assistance", the State "shall be surrogated, to the extent of the cost of the medical care furnished, to any rights the [recipient] may have . . . under the cause of action."

27. Minn. Stat. § 256B.37, subd. 2 enables the attorney general to institute a direct, independent action against a responsible third party to enforce its subrogation rights.

28. Minn. Stat. § 256B.37, subd. 4 establishes the injured Medical Assistance recipient's right to a portion of the State's recovery: "Upon any judgment, award, or settlement of a cause of action, or any part of it, upon which the State agency has a subrogation right, including compensation for liquidated, unliquidated, or other damages, reasonable costs of collection, including attorney fees, must be deducted first. The full amount of medical assistance paid to or on behalf of

the person as a result of the injury must be deducted next and paid to the State agency. The rest must be paid to the medical assistance recipient or other plaintiff. The plaintiff, however, must receive at least one-third of the net recovery after attorney fees and collection costs."

29. Pursuant to Minn. Stat. §§ 256B.042, subd. 5 and 256B.37, subd. 4, plaintiffs and class members are entitled to the difference between the amount of the tobacco trial settlement and the amount of movies expended to treat smoking-related illnesses, but not less than one-third of the net recovery after attorneys fees and other collection costs.

30. Plaintiffs and class members are entitled to a declaration of their rights, pursuant to Minn. Stat. § 555.01 et seq., as against defendant under the terms of Minn. Stat. §§ 256B.042, subd. 5 and Minn. Stat. § 256B.37, subd. 4.

COUNT 2
DECLARATORY JUDGMENT PURSUANT TO MINN. STAT. § 256D.03

31. Plaintiffs incorporate by reference the averments in paragraphs 1 through 30 above.

32. Minn. Stat. § 256D.03 prescribes the means by which the State can seek to recover the amounts paid on behalf of General Assistance recipients from liable third parties, and establishes the rights of the injured General Assistance recipient should the State succeed in collecting such sums.

33. Minn. Stat. § 256D.03, subd. 8(c) provides that when medical services are provided to a General Assistance recipient who has "a cause of action arising out of an occurrence that necessitated the payment of assistance", the State "shall be subrogated, to the extent of the cost of medical care . . . , to any rights the [recipient] may have . . . under the cause of action."

34. Minn. Stat. § 256D.03, subd. 8(d) enables the attorney general to institute a direct, independent action against a responsible third party to enforce its subrogation rights.

35. Minn. Stat. § 256D.03, subd. 8(f) establishes the injured General Assistance recipient's right to a portion of the State's recovery: "Upon any judgment, award, or settlement of a cause of action, or any part of it, upon which the State agency has a subrogation right, including compensation for liquidated, unliquidated, or other damages, reasonable costs of collection, including attorney fees, must be deducted first. The full amount of general assistance or general assistance medical care paid to or on behalf of the person as a result of the injury must be deducted next and paid to the State agency. The rest must be paid to the public assistance recipient or other plaintiff. The plaintiff, however, must receive at least one-third of the net recovery after attorney fees and collection costs."

36. Pursuant to Minn. Stat. § 256D.03, subd. 8(f), plaintiffs and class members are entitled to the difference between the amount of the tobacco trial settlement and the amount of monies expended to treat smoking-related illnesses, but not less than one-third of the net recovery after attorneys fees and collection costs.

37. Plaintiffs and class members are entitled to a declaration of their rights, pursuant to Minn. Stat. § 555.01 et seq., as against defendant under the terms of Minn. Stat. § 256D.03, subd. 8(f).

WEREFORE, plaintiffs on behalf of themselves and other similarly situated request that the Court enter judgment:

A. Certifying this action as a class action pursuant to Rule 23 of the Minnesota Rules of Civil Procedure and naming plaintiffs as representatives of the class defined herein;

B. Declaring the rights, status, legal relations, and liabilities of the parties pursuant to the terms of the

Minn. Stat. § 256D.042, subd. 5 and Minn. Stat. § 555.01 et seq.;

C. Declaring the rights, status, legal relations, and liabilities of the parties pursuant to the terms of the Minn. Stat. § 256B.37, subd. 4 and Minn. Stat. § 555.01 et seq.;

D. Declaring the rights, status, legal relations, and liabilities of the parties pursuant to the terms of the Minn. Stat. § 256D, subd. 8(f) and Minn. Stat. § 555.01 et seq.;

E. Awarding the plaintiffs and the plaintiff class, and against the defendant, damages in an amount not less than one-third of the net recovery made by the State in the Tobacco Litigation;

F. Declaring that all lien and subrogation interests created in favor of the State pursuant to Minn. Stat. § 256B.01 et seq. and Minn. Stat. § 256D.01 et seq. are satisfied and/or forever discharged in favor of the plaintiffs and members of the plaintiff class;

G. Awarding the plaintiffs and the plaintiff class the costs of suit, including disbursements and reasonable attorney's fees; and

H. Granting to plaintiff and the class such other and further relief as the Court deems just, equitable, or appropriate.

Dated: August 18, 1998 MESHBESHER & SPENCE LTD.

s/

Anthony J. Nemo (#221351)
Ronald I. Meshbesher (#72229)
1616 Park Avenue South
Minneapolis, MN 55404
(612) 339-9121

Hugh V. Plunkett, III (#87282)

Robert K. Shelquist (#21310X)
PLUNKETT, SCHWARTZ,
PETERSON, P.A.
East Bridge at Riverplace
10 Second Street N.E., Suite 114
Minneapolis, MN 55413
(612) 378-3700

John A. Cochrane (#17577)
COCHRANE & BRESNAHAN
24 East 4th Street
St. Paul, MN 55101
(612) 298-1950

ACKNOWLEDGEMENT

The undersigned hereby acknowledges that costs, disbursements, and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. § 549.21, Subd. 2, to the party or parties against whom the allegations in this pleading are asserted.

s/_____
Anthony J. Nemo

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY III
ATTORNEY GENERAL July 22, 1998

BY FACSIMILE AND FIRST CLASS MAIL

Hugh V. Plunkett, III
Robert K. Shelquist
Plunkett, Schwartz,
Peterson, P.A.
East Bridge at Riverplace
10 Second Street NE, Suite 114
Minneapolis, MN 55413

Ronald I. Meshbesher
Anthony J. Nemo
Meshbesher & Spence,
Ltd.
1616 Park Avenue South
Minneapolis, MN 55404

John A. Cochrane
Cochrane & Bresnahan
24 East Fourth Street
St. Paul, MN 55101

Re: Jesse Lee Brown and Ronald J. Bergerson v. The State of Minnesota

Dear Messrs. Plunkett, Shelquist, Meshbesher, Nemo and Cochrane:

We have reviewed the class action complaint which you have signed in the above-captioned action. It is clear that whoever drafted the complaint took no reasonable steps to investigate and did not understand the State of Minnesota's action in the underlying cigarette litigation, The State of Minnesota and Blue Cross and Blue Shield of Minnesota v.

Philip Morris, Inc. et. al., Ramsey County District Court, C1-94-8565. The basic factual and legal predicate upon which your complaint is based is false and/or erroneous, as even a cursory review of the public file in this action would reveal. The State's complaint and prosecution of the case was always as a direct action by the State of Minnesota. The State did not file a subrogation action, and the State did not sue to recover damages sustained by smokers. A copy of the Second Amended Complaint, the Settlement Agreement and Stipulation for Entry of Consent Judgment and the Consent Judgment are enclosed.

Contrary to the assertions in paragraph 6 of your complaint, the State of Minnesota did not bring or prosecute the cigarette litigation "in a representative capacity pursuant to Minn. Stat. § 256B.01 et seq. and Minn. Stat § 256D.03, subd. 3." The State sued in its law enforcement capacity seeking, inter alia, disgorgement of profits, statutory penalties, and punitive damages. The State also sought damages in its proprietary capacity for its own out-of-pocket expenditures for treating smoking-attributable disease. The State sought to recover money that the State spent on medical care; this was money that the State spent, not money that may have been spent by either individual smokers or private third-party payers. Moreover, the settlement in this matter will be payable in perpetuity, reflecting the ongoing costs to the State of the tobacco companies' misconduct. The State of Minnesota did not sue, seek or receive damages on behalf of any individual smokers for any damages or injuries sustained by smokers or any element of damages which your clients would be entitled to. To the extent that any of your clients or any putative class members have suffered personal injury losses, they would certainly be entitled to sue the tobacco companies since those causes of action were not litigated in our case.

The specific statutes which you cite in your complaint are - - on their face - - inapplicable. These statutes address the

situation where an individual brings a personal injury cause of action (which is not the situation in the present case) and the State asserts a subrogation right and/or a lien to recover the amount of money the State paid for medical care (which is not the situation in the present case).

The State expended funds to pay for medical treatment that your clients and other putative class members could not afford. After a monumental legal battle lasting four years, the State prevailed in an historic settlement covering all its varied claims. Since the settlement resolved all claims, any allocation of it to health care for the named plaintiffs or putative class would be arbitrary and entirely speculative. Now you are demanding that the State, which paid for your clients' medical care, hand over to your clients the money recovered by the State, which your clients never paid in the first instance.

Your clients or unnamed putative class members may not understand the legal framework of the State of Minnesota's action. However, you have a duty to assure that your claim is grounded in the law. The class action complaint which you signed is frivolous. It is clear that no reasonable inquiry was undertaken prior to the signing of your complaint. We expect that you will voluntarily dismiss the action before the expenditure of unnecessary attorney time and costs by the State. Please advise this Office by the close of business on Monday, July 27, 1998, whether you will discharge your responsibilities as officers of the court under applicable statutes and rules of civil procedure and dismiss your action.

Sincerely,

s/
LEE E. SHEEHY
Chief Deputy Attorney General

cc: Michael V. Ciresi, Esq., Robins, Kaplan, Miller & Ciresi

Thomas F. Pursell, Senior Counsel

AG:140032 vl

Excerpt from the Hearing Transcript before the Trial Judge.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Jesse Lee Brown, and Ronald J. Bergerson, on behalf of themselves and others similarly situated,	*	
Plaintiffs,	*	TRANSCRIPT OF PROCEEDINGS
vs.	*	File No. 98-11152
State of Minnesota,	*	
Defendant.	*	

The above-entitled matter came on for hearing before the Honorable H. Peter Albrecht, Judge of the above Court, at the Brookdale Courthouse, Brooklyn Center, Minnesota, on the 16th day of September, 1998.

* * * * *

APPEARANCES:

HUGH PLUNKETT, Esq., and RONALD MESHBESHER, Esq., appeared on behalf of the Plaintiffs.

MICHAEL CIRESI, Esq., and THOMAS PURSELL, Esq., appeared on behalf of the Defendant.

DEBRA A. BOWSER, Court Reporter.

* * * * *

* * * * *

individual cause of action and we are seeking these damages." They are not prevented from bringing a cause of action. They've got one. If they paid some medical expenses, they can put everything in. The State doesn't have a right to a penny and if they tried to recover what the State set out, you know what the tobacco industry would do. That's why you have the settlement agreement wherein the way it is, the tobacco industry would say, "Wait a minute, you can get all your damages that you want, you can't get what the State paid, we've already settled that part, that's done. You never paid a penny for that, you are not entitled to it and no statute created a cause of action for you." That's what we are talking about here, Judge. They have turned this thing completely on its head.

You know, we have said what we think of their cause of action. I'm not going to get into that. But the fact is this is relatively simple. There is no cause of action for them created under these statutes. None. Thank you, Your Honor.

THE COURT: We haven't gotten into the sanctions issue, do either of you want to be able to argue that?

MR. CIRESI: No, we'll rest on our papers,

* * * * *

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Case Type: Declaratory Judgment

JESSE LEE BROWN and RONALD J. BERGERON, on behalf of themselves and all others similarly situated,

Court File No.: 98-11152

Plaintiffs,

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND FOR SANCTIONS

vs.

THE STATE OF MINNESOTA,

Defendants.

I. INTRODUCTION

The Defendant State of Minnesota submits this Memorandum in support of its motion to dismiss and for sanctions. In their lawsuit, plaintiffs lay claim to billions of dollars of public money from the recent settlement in *State of Minnesota and Blue Cross-Blue Shield of Minnesota v. Philip Morris Incorporated, et al* (hereinafter "Tobacco Litigation" or "Tobacco Case"). It is clear from the face of their complaint, and from the court orders, pleadings and other public records of the Tobacco Litigation, however, that plaintiffs' claim is based on false premises or mischaracterizations of the Tobacco Litigation and the basis of the settlement.

The State sued the tobacco companies in its law enforcement capacity, seeking, among other things, disgorgement of profits, statutory penalties, reform-oriented

injunctive relief and punitive damages. The State also sought damages, in its proprietary capacity, for its own out-of-pocket expenditures for treating smoking-attributable disease -- money that the State spent on medical care, not money spent by individual smokers or payable to them for their unique and individual injuries. Contrary to the allegations of plaintiffs' Complaint, the State did not bring the Tobacco Litigation "in a representative capacity pursuant to" the welfare statutes. The State did not sue for, seek or receive damages on behalf of any individual smokers for any damages or injuries sustained by smokers or any element of damages to which the plaintiffs in this case would be entitled. Plaintiffs and putative class members, if they have suffered provable, personal injury losses, remain free to sue the tobacco companies since their causes of action have not been litigated.

Because plaintiffs' claim is wholly without foundation in fact or law it should be dismissed. Because plaintiffs either failed to reasonably investigate the basis of their claims, or intentionally mischaracterized the nature of the Tobacco Litigation, the Court should grant the motion for sanctions.

II: STATEMENT OF FACTS

A. The Class Action Complaint

Plaintiffs served their Complaint on Friday, July 17, 1998, and publicly unveiled it through news releases on Monday the 20th. Plaintiff Jesse Lee Brown ("Brown") claims he received treatment for smoking related illness from January 1, 1978 to December 31, 1996, and that the "treatment was paid for in whole or in part" by the State under the Medicaid, or "Medical Assistance" program pursuant to Minn. Stat. Ch. 256D and 42 U.S.C. § 1396, et seq. Plaintiff Ronald J. Bergeron ("Bergeron") alleges similar facts, except that the State paid for his treatment through the General Assistance Medical Care program established by

Minn. Stat. Ch. 256D.[1] Plaintiffs' Complaint, at paragraphs 2 and 3.

The core allegations which plaintiffs claim entitle them to relief are set out in paragraphs 6 through 19 of the Complaint. They:

- Claim that the State filed the Tobacco Litigation "in a representative capacity pursuant to Minn. Stat. § 256B.01, et seq. and Minn. Stat. § 256D.03, subd. 3", Complaint at para. 6;
- Quote from the Second Amended Complaint in the Tobacco Litigation in which the State alleges that it suffered substantial and increased expenditures under the Medical Assistance and General Assistance Medical Care programs because of the alleged unlawful actions by the cigarette industry. Id. at paras. 7 and 8;
- Allege that the State presented testimony that smoking caused disease among persons covered by the two programs; that the "smoking-attributable expenditures for the State... during the period from 1978 Through 1996 is $1,310,000,000"; and that various summarized snippets of testimony were "adopted by the State *and formed the basis for the amounts recovered*" (the emphasized phrase, as much a legal conclusion as an allegation of fact, is repeated in the Complaint, paragraphs 9 -19; emphasis is added).

Based on the above allegations plaintiffs plead parallel causes of action based on the two public assistance programs. whose recipients they purport to represent. With respect to the Medicaid claim, Count I, plaintiffs allege that "Minn. Stat. § 256B.042 addresses third-party liability when the resulting

[1] The named plaintiffs also purport to be appropriate class representatives. The State disagrees but believes these allegations, and the other defenses which the State would assert, need never be addressed since their underlying claims are completely without merit.

injury results in medical assistance for needy persons." Complaint, paragraph 22. In Count 2, paragraph 27, plaintiffs make the same general claim with respect to the largely parallel statutes governing General Assistance Medical Care -- that Minn. Stat. § 256D.03, subd. 8(f) "addresses third-party liability when the resulting injury results in general assistance for needy persons."

Plaintiffs do not quote or characterize those subdivisions which put the relevant statutes in context and show that the statutes as a whole provide a mechanism for the State to recover its costs through the filing of liens on an injured plaintiff's individual action; not, as plaintiffs allege, for an injured person to claim a portion of the State's recovery.

B. The State Interests Asserted in the Tobacco Litigation

In August, 1994 the State and co-plaintiff Blue Cross-Blue Shield of Minnesota filed an action against the six domestic cigarette companies, one corporate parent, and two industry trade associations. The Attorney General brought the case as enforcer of the consumer protection and antitrust laws "to protect the citizens and the public health of the State of Minnesota by seeking declaratory and equitable relief and civil penalties," and to recover *the State's* direct damages to vindicate "the State's proprietary interest in enforcing the State's rights to damages for economic injuries to the State which were caused by the unlawful actions of the cigarette industry." *State of Minnesota and Blue Cross-Blue Shield of Minnesota v. Philip Morris Incorporated, et al,* Complaint at Para.. 7, Ramsey County District Court File No. C1-94-8565, (Filed August 17, 1994).[2] Among the economic injuries

[2] The State and Blue Cross filed two amended complaints. The First Amended Complaint named two British tobacco companies as defendants. The Second Amended Complaint added a claim for punitive damages. Because the allegations material to the instant lawsuit are all contained in

caused by the tobacco defendants' unlawful conduct, according to the Tobacco Complaint, were the State's increased expenditures in the Medicaid, General Assistance, MinnesotaCare, State Employee Group Insurance, and general wellness programs, plus general interference with the public health. Tobacco Complaint at paras. 7a - f. The nine causes of action included a tort count based on the undertaking of a special duty to the public health; two antitrust counts; four statutory consumer protection charges; and two equitable counts based on the state's out-of-pocket losses. Tobacco Complaint, paras. 85-128.

Nowhere in the Tobacco Complaint does the State purport to sue on behalf of individual Medicaid or General Assistance recipients, or in "a representative capacity. Nowhere is there an assertion of subrogation rights. Nowhere is there any claim for payments made by individuals, or for elements of damage suffered by individuals. Instead, the State sought wide-ranging injunctive relief, compensation for. its own injuries, and compensation for the kind of monetary relief to which the State might be entitled as the sovereign law enforcer and guardian of the general public health, including: punitive damages, funding of clinical cessation programs, disgorgement of profits, restitution for unjust enrichment, past and future damages, treble antitrust damages, attorneys fees, costs, disbursements, civil penalties of $25,000 for each violation of the consumer protection statutes, and civil penalties of $50,000 for each violation of the antitrust statutes. Tobacco Complaint at paras. 133a -135.

C. The Law of the Tobacco Case

The question of whether the State's case was properly pleaded as a direct case, rather than a representative action on

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the Second Amended Complaint, that document is attached as Appendix 1 and is hereinafter referred to simply as "the Tobacco Complaint."

behalf of smokers, was raised as an early tobacco company defense and became the subject of definitive rulings in the case.

Defendant Philip Morris, in its Answer of September 16, 1994 (Appendix 2), alleged as an affirmative defense, that the State "lacks authority and/or standing to bring any claim for medical expenses paid on behalf of Minnesota residents *except to the extent it sues as the subrogee. . ..*" (Emphasis added.) Moving to dismiss this and other affirmative defenses based on third-party (smoker) conduct, the State and Blue Cross and Blue Shield stated that they "have not brought this action as subrogated parties to any underlying tort claims that individual smokers may have against the cigarette industry," and that they sue "in their own right -- in a direct action -- to recover the enormous sums of money each spends to pay for health care . . . and to obtain equitable relief." Memorandum in Support of Plaintiffs' Motion for Judgment on the Pleadings, January 26, 1995 (Appendix 3), at page 2.[3]

On May 18, 1995, the Ramsey County District Court denied defendants' motions to dismiss and denied the State's

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[3] This point was made repeatedly. See e.g. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, February 21, 1995 (Appendix 4) at p. 3 ("[tobacco case] is not a product liability or a personal injury case. Instead it is an action brought by two of the largest purchasers of health care services in this state who have been injuried in their 'business or property' by the wrongful acts of defendants..."); Reply Memorandum in Support of Plaintiffs' Motion for Judgment on the Pleadings, March 2, 1995 (Appendix 5) at pp. 28-29 ("The damages incurred by the State and Blue Cross, in the form of increased expenditures for medical costs, are distinct and separate from any personal injury damages individual smokers have suffered, such as bodily and mental harm and loss of earnings. Even defendants admit the distinctiveness of these two sets of claims."); Defendants' Memorandum in Opposition to Plaintiffs' Motion for Judgment on the Pleadings, February 21, 1995 (Appendix 6) at p. 33 ("If Plaintiffs do not join individual smokers as parties, those smokers may not be bound by any judgment here. Defendants would then face the possibility of a later suit by smokers for additional damages such as pain and suffering.")

motion to dismiss certain affirmative defenses as premature. In the Order, the court clearly rejected the tobacco companies' argument that the State had sued, or could only sue, on behalf of individual smokers. Order and Memorandum at 3 - 4, Appendix 7. The Court specifically noted that "Plaintiffs state that they have intentionally pled their complaint based on the independent and direct harm allegedly suffered by them due to Defendants' acts and, thus, any defenses related to conduct of third party smokers are irrelevant and legally insufficient. Defendants argue that their affirmative subrogation defenses are relevant because the Plaintiffs' were not themselves directly harmed . . . ." The Court, in refusing to dismiss the challenged counts, recognized and upheld the direct nature of the State's claim. At the same time, the court deferred ruling on the State's motion to dismiss the tobacco companies' third-party type defenses, warning, however, that "[t]he denial of the motion at this time . . . shall not be construed to sanction conversion of this case into one of subrogation." Id. at 4.

When the tobacco defendants appealed the trial court's validation of Blue Cross' standing,[4] the Minnesota Supreme Court upheld Blue Cross' right to sue on all but the tort/special undertaking count. *State of Minnesota and Blue Cross-Blue Shield of Minnesota v. Philip Morris Incorporated, et al,* 551 N.W.2d 490, 495-97 (1995). This ruling did not affect the State's tort claim, but it necessarily upheld the essential, direct character of the lawsuit.

Having previously deferred ruling on the State's motion to dismiss affirmative defenses based on smoker conduct, the trial court ruled definitively on January 27, 1998 in its Order Granting in Part and Denying in Part Plaintiffs' Motion for Summary Judgment Dismissing Defendants' Affirmative Defenses Based Upon Conduct of Individual Smokers

[4] The tobacco defendants appealed only from the trial court's order as to Blue Cross.

(Appendix 8). Finding that the Supreme Court had, by implication, held that the State had a direct action, and finding further that "[t]he conduct of individual smokers is irrelevant to the majority, but not all of the issues in this case;" the trial court held that "Plaintiffs have a direct claim to which the undisputed rule against imputed defenses applies." The trial court qualified its summary judgment in favor of the Plaintiffs only by its holding that the presence of smokers in the causal chain might require admission of evidence about individuals as bearing on other issues. Order, Appendix 8 at pp. 2 and 3.

At the close of the evidence the trial court instructed the jury as follows: "You are instructed that this case is a direct action brought by the State of Minnesota and Blue Cross and Blue Shield of Minnesota. No individual smoker is a party to this action. The actions of individual smokers do not insulate defendants from liability . . . . Transcript at 15643-4 (Appendix 9) (emphasis added). This instruction was given on May 6, 1998. Two days later the case settled.

D. The Tobacco Settlement

The tobacco settlement consists of two documents, a Settlement Agreement and Stipulation for Entry of Consent Judgment (hereinafter referred to as the "Settlement Agreement -- Appendix 10) and the Consent Judgment (Appendix 11) entered into between the State and five "settling defendants" The Settlement Agreement, at page 2, recites that the State "assert[ed] various claims for monetary, equitable and injunctive relief . . . ." The monetary payment paragraph reads:

> Settlement Receipts. The payments to be made by the Settling Defendants under this Settlement Agreement are *in satisfaction of all of the State of Minnesota's claims* for damages incurred by the State in the year of such payment or earlier years

> related to the subject matter of this action, *including, without limitation, claims for equitable and injunctive relief, claims for health care expenditures and claims for punitive damages,* except that no part of any payment under this Settlement Agreement is made in settlement of an actual or potential liability for a fine, penalty (civil or criminal) or enhanced damages.

Appendix 10 at section II A (emphasis added).

The Settlement Agreement provides for a perpetual stream of payments.[5] App. 10 at section II D. The payments are "in satisfaction of all of the [State's] claims for damages incurred by the State in the year of such payment or earlier years related to the subject of this action." *Id.* at II A. The payments are subject to a variety of adjustments based on future contingencies. *Id.* at II B and E. There is no link in the settlement documents between the settlement payments and the Medicaid or General Assistance Medical Care programs, or even any mention of the programs. There is no statement or inference in the documents that the damage model "formed the basis for the settlement." There is no designation or allocation of the settlement money as among the State's various claims.

The consideration for the payments is the State's discharge and release of all claims "for past conduct . . . relating to the subject matter of this action which have been or could be asserted," and for specified future conduct, Id. at III B. *Nothing in the settlement compromises, release,*

[5] The figure of $6.17 billion commonly assigned as the settlement's value is derived by the adding the face value of the payments, without adjustments or discounting, over a period of 25 years. The 25-year period is essentially arbitrary, but became a convention for valuing tobacco settlements -- since used in all settled state cases -- during early discussions over a potential national settlement.

discharges or in any way affects the claims of individual smokers, be they public assistance recipients or otherwise.[6]

E. Minnesota's Medicaid and General Assistance Medical Care Programs

The Minnesota Department of Human Services ("Department") operates the Medicaid program, a federal-state partnership, under 42 U.S.C. § 1396, *et seq.* and Minn. Stat. § 256B and the General Assistance Medical Care program, a purely state-law creation, under Minn. Stat. § 256D.03 (1996). Under the statutes, the State pays specified health care bills for eligible people, usually referred to as "recipients." Minn. Stat. §§ 256B.02, Subd. 8, 256B.03, Subd. 1, and 256D.03, Subds.3-4 (1996). If a recipient is injured by a third party -- say a negligent driver -- the recipient may sue for and recover from the third party or insurer, State, Dept. of Human Services v. Bengston, 506 N.W.2d 38 (Minn. App. 1993); Minn. Stat. §256B.042, Subds. 1 and 4 (1996). An award may include various elements of damage, such as pain and suffering, loss of consortium and costs of medical care.

Minn. Stat. §§ 256B.042 (Medicaid) and 256D.03 (General Assistance Medical Care) give the Department a right to recover program costs when a recipient has been injured by a third party. The statutes also lay out the process the Department must follow (largely the filing and enforcement of liens against a recipient's potential judgment or award); and Minn. Stat. §§ 256B.042, subd. 5 and 256D.03, subd. 8 (f) establish a formula for the apportionment of damages between the Department and the recipient. These

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[6] A smoker class action suit filed in Ramsey County District Court in September, 1996 on behalf of all nicotine-dependent Minnesota residents, presumably including plaintiffs, was removed to federal district court and is scheduled for trial in March, 2000. *Thompson v. American Tobacco, Incorporated, et al,* File No. 3-96-CV888 (D. Minn.)

statutes give the Department the right to recover program costs but allow the plaintiff/recipient who has taken the initiative to sue a third party the right to keep at least a third of the award, less attorneys fees and costs of collection. Id.

If the recipient does not choose to pursue a third party, Minn. Stat. § 256B.042, subd. 3 and 256D.03, subd. 8 (d) authorizes the State, or a county attorney, to recover the medical assistance or General Assistance Medical Care provided in a derivative action. *See* Minn. Stat. §§ 256B.042. subd. 3 ("If no action has been brought [attorney general or county attorney] may initiate action...") and 256D.03, subd. 3 (d) ("To recover under this section, the attorney general . . . . may institute or join a civil action to enforce the subrogation rights established under this section.").

Nothing in the statutes or rules gives a recipient a cause of action against the State when the State has sued a third party, in a non-subrogation capacity, for direct damages to the programs as a whole, much less a right to share in the settlement of a combined law enforcement and direct damages case.

F. The Sanctions Motion

Soon after receiving and evaluating the Complaint in this action Chief Deputy Attorney General Lee E. Sheehy sent a letter to plaintiffs' counsel briefly summarizing the facts noted in the preceeding sections of this Memorandum and providing copies of relevant documents. The letter warned counsel that the State regarded the case as frivolous and gave them the opportunity to withdraw the Complaint. *See* Letter of Lee E. Sheehy, Exhibit 1.[7] Plaintiffs counsel refused to withdraw the complaint. Letter of John Cochrane, Exhibit 2.

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[7] This exhibits and affidavit cited in this section are offered for the sanctions motion only.

On July 29, 1998, 12 days after filing the complaint and two days after the Sheehy letter, a person from the Meshbesher Firm called the Department of Human Services to determine whether the Department had (consistent with plaintiffs' theory that the State pursued the Tobacco Litigation under the Medicaid and General Assistance statutes) filed any liens against Plaintiffs Brown and Bergeron. Affidavit of Janice Taylor. Because the Tobacco Litigation did not trigger any of the statutory procedures relied on by plaintiffs, the State has not filed any such liens. Id.

III. ARGUMENT

PLAINTIFFS CANNOT TRANSFORM THE TOBACCO LITIGATION FROM WHAT IT WAS -- A LAW ENFORCEMENT AND POLICE POWER ACTION FOR ANTITRUST, CONSUMER PROTECTION AND COMMON LAW VIOLATIONS, SEEKING COMPENSATION FOR DIRECT HARM TO THE STATE'S INTERESTS, PLUS A WIDE ARRAY OF OTHER MONETARY AND EQUITABLE, RELIEF -- INTO WHAT THEY WISH IT WERE -- AN ACTION BROUGHT ON THEIR BEHALF PURSUANT TO THE WELFARE STATUTES, SEEKING SOMETHING WHICH BELONGS TO THEM. THEIR COMPLAINT MUST THEREFORE BE DISMISSED.

The State brings this motion under Minn. R. Civ. P. 12.02(e), for failure to state a claim upon which relief may be granted. To avoid dismissal under this rule, a complaint must set forth a legally sufficient claim for relief. *Elzie v. Commissioner of Public Safety,* 298 N.W.2d 29, 32 (Minn. 1980) (citation and quotation omitted). Under the rule, a pleading should be dismissed if it appears that no facts could be introduced, consistent with the pleading, which would support the requested relief. *Northern States Power Co. v.*

Franklin, 265 Minn. 391, 122 N.W.2d 26, 29 (1963). In considering such a motion, the court accepts the facts as alleged in the complaint. *Elzie*, 298 N.W.2d at 32. Under this standard, plaintiffs' case should be dismissed.

The court orders, pleadings, transcripts and other publicly available proceedings of the tobacco litigation,[8] and a plain reading of the welfare statutes which plaintiffs plead as their basis for recovery, show that under no circumstances could plaintiffs be entitled to any share of the settlement proceeds. The law of the Tobacco Case, as alleged in the Tobacco Complaint, as ordered by the district court, and as approved by the Minnesota Supreme Court in *State by Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490 (Minn. 1996), is that the State brought a direct action against the tobacco companies for a broad array of law enforcement, equitable and monetary relief, based on violations of statutes and common law. It was not, on its face or under the law of the case, a subrogation action, nor, as plaintiffs allege, an action brought "in [the State's] representative capacity," under the welfare statutes. The statutes do not even remotely allow plaintiffs to lay claim to undesignated settlement proceeds from a consumer protection, antitrust and common law action brought against third parties for a wide range of monetary and other relief.

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[8] While the court does not consider extrinsic evidence in ruling on a motion to dismiss, it may "take judicial notice of matters of public record" without converting the motion to dismiss to a motion for summary judgment. *Henson v. CSC Credit Services*, 29 F.2d 280, 284 (7th Cir. 1994), and cases cited therein. The State hereby requests the court to take judicial notice of the proceedings of the Tobacco Litigation which are submitted as Appendices 1 - 11, just as the federal district court in *Henson* took notice of public court documents filed in an earlier state court action. *Id.* Minnesota courts may also consider, in a Rule 12.02(e) motion, documents upon which the complaint is premised *In re Hennepin County 1986 Recycling Bond Litigation*, 540 N.W.2d 494, 497 (Minn. 1995); *Johnson v. State*, 536 N.W.2d 328, 332 (Minn. Ct. App. 1995), *rev'd on other grounds*, 553 N.W.2d 40 (Minn. 1996).

A. THE TOBACCO LITIGATION, AS PLEADED BY THE STATE AND AS RULED BY THE MINNESOTA COURTS, WAS A DIRECT ACTION FOR THE STATE'S OWN UNIQUE RELIEF BECAUSE THE STATE NEITHER SOUGHT NOR RECEIVED ANYTHING OF PLAINTIFFS', AND DID NOT ACT OR PURPORT TO ACT ON THEIR BEHALF, PLAINTIFFS' COMPLAINT MUST BE DISMISSED.

Plaintiffs' case is based on two false premises about the Tobacco Litigation. Standing on this false foundation, plaintiffs use the misreading of two welfare statutes to spin the bizarre theory that the State, in the tobacco settlement, got something that belongs to them.

The first false premise is the plaintiffs' central factual allegation, to wit that "the State of Minnesota filed [the Tobacco Litigation] in a representative capacity pursuant to Minn. Stat. § 256B.01, et seq. and Minn. Stat. § 256.03, subd. 3. . . ." Complaint at 6. Section II B of this Memorandum contains a four-and-a-half page litany of Tobacco Litigation court orders and pleadings which clearly and expressly refute plaintiffs' allegation.

State by Humphrey v. Philip Morris, Incorporated, et al was not conceived or pleaded as a "representative" case. The reader of the Tobacco Complaint will search in vain for any assertion of subrogation rights, any claim to represent the interests of third parties, or the merest hint that the case is brought on behalf of individuals. Appendix 1, *passim.* The only reference to the Medicaid or General Assistance Medical Care Programs is to their enabling statutes, as two of the many potential sources of monetary recovery. *Id.* at paras. 7a., 7b., 133a - 135. The action was not and did not purport to be brought "pursuant to" the welfare statutes. It was brought, instead, by the Attorney General "on behalf of the

State of Minnesota pursuant to his authority under the common law, as well as Minn. Stat. §§ 8.01, 8.31, 325D.09-15, 325D.43-45, 325D.49-66 and 325F.67-70" *Id.* at para. 7. The nine counts, based on the common law and the cited statutes, quite explicitly pleaded injury to the State as a payer of medical expenses. *See e.g.* Appendix 1 at para. 88 ("As a direct and proximate result of defendants' conduct, the State and Blue Cross have suffered and will continue to suffer substantial injuries and damages.").

Plaintiffs' central allegation stands debunked by a simple look at the Tobacco Complaint. But the proof of its falsity continues. The tobacco companies defended the action on the same ground that plaintiffs now occupy, asserting that the tobacco plaintiffs had no authority to bring the case *except* as representatives of individual smokers, *see e.g.* Answer of Philip Morris, Incorporated, Appendix 2 at para. 145, and they moved to dismiss the case on that very basis, fighting the issue, as to Blue Cross, all the way to the Minnesota Supreme Court, *see State of Minnesota and Blue Cross-Blue Shield of Minnesota v, Philip Morris, Incorporated, et al,* 551 N.W.2d 490, 495-97 (1995).

For three-and-a-half years the tobacco companies haplessly wielded the same brush as the current plaintiffs, painting the State as standing in the shoes of the various classes of persons for whom the State -- directly -- incurred extra expenses as a result of the industry's conduct. The State responded that "the [tobacco] case is not a product liability or personal injury case." Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, Appendix 4 at p. 3. Addressing the tobacco companies' third party defenses -- defenses the companies would be able to assert in an action brought *by the instant plaintiffs, for their own damages* -- the State denied any intent to represent others: "[The State and Blue Cross] have not brought this action as subrogated parties to any underlying tort claims that individual smokers may have against the cigarette industry" Memorandum in Support

of Plaintiffs' Motion for Judgment on the Pleadings, Appendix 3 at 2. And later: "The damages incurred by the State . . . in the form of increased expenditures for medical costs, are distinct and separate from any personal injury damages individual smokers have suffered, such as bodily and mental harm and loss of earnings." Reply Memorandum in Support of Plaintiffs' Motion for Judgment on the Pleadings, Appendix 5 at p. 28-29 (emphasis in original).

During this exchange the tobacco defendants conceded "the possibility of a later suit by smokers for additional damages such as pain and suffering," but not medical costs. Defendants' Memorandum in Opposition to Plaintiffs' Motion for Judgment on the Pleadings, at App. 6 at p. 33. The trial court agreed with the State, ruling that the tobacco plaintiffs had standing to bring direct, non-derivative claims. Ramsey County District Court's Order and Memorandum of May 18, 1995, App. 7 at pp. 3-4. When the tobacco companies appealed, with respect to Blue Cross but not the State, the Supreme Court upheld the direct nature of the action. *State of Minnesota v. Philip Morris, Incorporated, et al,* 551 N.W.2d 490. The Supreme Court's decision allowed discovery to proceed.

The simple proposition that the State brought the Tobacco Litigation for its direct damages could not be clearer; nor could the ramifications for the instant case, where this proposition alone is dispositive. It all boils down to this: the State did not claim anything belonging to the Plaintiffs. It sought only its own damages, including direct medical expenses -- the very kinds of expenses which the State would be entitled to recover from plaintiffs if plaintiffs had taken the initiative to sue to tobacco companies. *See* Minn. Stat. §§ 256B.042 and 256D.03.

Just as false as Plaintiffs' first and central premise -- that the Tobacco Litigation was brought on their behalf -- is their second premise, namely that in settling the case, the State received something that belonged to them. A look at the

settlement documents quickly disposes of Plaintiffs' theory. The tobacco companies' payments are in satisfaction of all of the State's claims, including those for equitable and injunctive relief (i.e. the restitution and unjust enrichment claims pleaded. in the complaint), punitive damages, and health care expenditures. Settlement Agreement, App. 10 at para. II.A. Civil penalties, not tax deductible business expenses under the IRS Code § 162(f), are excepted.[9] Id. Significantly, while the State broadly released all of its potential claims against the tobacco defendants, the claims of individual persons are *not* released. Settlement Agreement, Appendix 10 at section III B. This flows naturally from the fact that the State was not pressing and did not collect claims belonging to individuals. Thus, plaintiffs remain free to pursue their claims as part of the *Thompson* class action, or to opt out and litigate on their own *against the tobacco companies* which caused their injuries.

Since the State neither sought nor settled for anything belonging to plaintiffs, it is almost superfluous to point out that the settlement agreement provides not just for payment of past damages, but also for the ongoing harm caused to the State from the continuing use of tobacco products. From the allegations of paragraphs 24 and 29 one of Plaintiffs' theories appears to be that, because the distribution formulae of the welfare statutes, Minn. Stat. §§ 256B.042, subd. 5 and 256D.03, subd. 8f, allow the State, in an action brought thereunder, to recover medical expenses, but allow the

[9] Penalties for violations of the antitrust and consumer protection laws are for each violation. Minn. Stat. §§ 8.31, subd. 3, 325D.56, and 645.24. There are various ways to compute violations, but, by way of illustration, each issue of a publication containing a false or misleading advertisement may be considered a separate violation, State v. Menard, Inc., 358 N.W.2d 813 (Wis. Ct. App. 1984), as may each day during which an antitrust conspiracy remains in effect, United States v. Phelps Dodge Industries, Inc., 589 F. Supp. 1340, 1360-62 (S.D.N.Y. 1984). Had the case not been settled, and instead proceeded to a verdict, civil penalties alone could have accounted for the entire recovery.

recipients to keep a portion, that "plaintiffs and class members are entitled to the difference between the amount of the tobacco trial settlement and the amount of monies expended to treat smoking-related illnesses, but not less than one-third of the net recovery . . . . " Complaint at paras. 24 and 29. The chain of logic, and its fatal flaws, are thus:

- The State brought the Tobacco Litigation for the harm that smoking caused to the Medicaid and General Assistance Medical Care programs and the programs' recipients. *(1) False in that the State made multiple claims for money payment, not just compensatory damages based on the welfare programs, and (2) false in that the State sought only its own damages, and not those of recipients.*
- The State brought the Tobacco Litigation under Sections 256B.042, subd. 5 and 256D.03, subd. 8f. *False, since the State pursued nine statutory and common law counts against the tobacco industry, none of which relied on or invoked the cited statutes*
- The monetary settlement is attributable to compensatory damages for accumulated Medicaid and General Assistance Medical Care expenses. *False because (1) the settlement funds are not designated as to source, (2) are in settlement of all the State's claims, not just compensatory damages for welfare programs, (3) no individual claims were covered or released, and (4) settlement funds are payable in perpetuity, for both past and future claims, not just Medicaid and General Assistance Medical Care damages accumulated during 1978 -1996.*
- If the State got more than $1.31 billion -- the full amount of its compensatory damages -- the rest must belong to the recipients under sections 256B.042, subd. 5 and 256D.03, subd. 8f. *False, for all of the above reasons.*

In this chain of logic, every link is false.

In summary, the premises on which plaintiffs' bring this lawsuit are obviously and demonstrably false, as is apparent from the Complaint, Court Orders, Supreme Court decision, and other public proceedings of the tobacco litigation. The State did not in fact or theory bring the Tobacco Litigation "in a representative capacity," and the Minnesota Courts have so found. The State did not claim, and did not receive, any element of damages belonging to plaintiffs. Nor did the State bring its case against the tobacco industry pursuant to the Medicaid and General Assistance Medical Care statutes upon which Plaintiff's rely. As more fully explained in the next section, those statutes have nothing to do with a case such as the Tobacco Litigation.

B. PLAINTIFFS HAVE TURNED THE MEDICAID AND GENERAL ASSISTANCE MEDICAL CARE STATUTES UPSIDE DOWN, PLEADING THAT STATUTES WHICH PERMIT THE STATE TO RECOVER PROGRAM COSTS FROM RECIPIENT'S CAUSES OF ACTION IN FACT GIVE THE RECIPIENTS A RIGHT TO THE STATE'S RECOVERY.

Plaintiffs contend that two state statutes, one governing medical assistance liens and one governing subrogation in the general assistance medical care program, entitle them to receive at least one-third of the State's recovery in its historic lawsuit against the tobacco industry. There is no legal basis for plaintiffs' claims. Plaintiffs attempt to torture two statutes which permit the State to recover medical expenses, when a recipient gets a damage award, into ones which require the State to yield its own damages to them.

1. The Distribution Formula Set Out At Minn. Stat. § 256B.042, Subd. 5 Does Not Apply To The State's Tobacco Settlement.

Plaintiff erroneously base their claim in the instant case in major part on the distribution formula set out in Minnesota's Medicaid lien statute.

The Medicaid lien statute was enacted to ensure that state funds expended to provide necessary medical care to needy, injured individuals were recovered from third parties who were primarily responsible to pay for the medical care. Lundberg v. Jeep Corp., W. C7-98-127, 1998 WL 372722, 2 (Minn. App. July 7, 1998). The statute gives the Department of Human Services a lien for its cost of care on any and all causes of action that the injured medical assistance recipient may have against the person or entity responsible for his injury or liable for his medical care. Minn. Stat. § 256B.042, subd. 1 (1996). The statute also sets out a procedure which the Department of Human Services must follow to perfect its lien. Minn. Stat. § 256B.04, subd. 2 (1996). The statute is designed to make sure the Department is not shut out of an injured party's cause of action and that its interests are protected should the recipient's cause of action settle. State Dept. of Human Services v. Bengston, 506 N.W.2d 38 (Minn. App. 1993).

Under the statute, injured Medicaid recipients, insurance companies, and tort-feasors are required to notify the Department of its lien interest. Minn. Stat. § 256B.042, subd. 4 (1996), Bengston, 506 N.W.2d at 39. Moreover, the parties are precluded from settling with each other and defeating the Department's reimbursement rights. Minn. Stat. § 256B.042, subd. 5 (1996). The statute was designed to protect the Department's interests when an injured recipient pursues an action against the person responsible for his injury or liable for his medical care. Id. Under the statute, once the lien is filed, it must be satisfied from any judgment, award, or

settlement reached in the case. Id. The statute quoted in plaintiff's Complaint, establishes what is referred to as "the distribution formula"--the scheme of how judgment, award or settlement funds will be distributed when the Department -- has filed a lien.

> Upon any judgment, award, or settlement of a cause of action, or any part of it, *upon which the state agency has filed its lien,* including compensation for liquidated, unliquidated, or other damages, reasonable costs of collection, including attorney fees, must be deducted first. The full amount of medical assistance paid to or on behalf of the person as the result of the injury must be deducted next, and paid to the state agency. *The rest must be paid to the medical assistance recipient or other plaintiff. The plaintiff, however, must recover at least one-third of the net recovery after attorney fees and other collection costs.*

Minn. Stat. § 256B.042, subd. 5 (1996) (emphasis added).

Brown and Bergeron contend that the statute's distribution formula entitles them to a substantial share of the State's tobacco settlement. Plaintiff's contention is clearly absurd. The distribution formula specifies how much the State gets from a "medical assistance recipient's" cause of action on which the Department of Human Services has filed a lien. The distribution formula does not extend to the situation at hand, where the State of Minnesota under a variety of law enforcement and common law theories, pursued a direct action for its own damages and only its own damages against the cigarette industry. Moreover, the Department of Human Services has not filed liens on the causes of action the named plaintiffs, and the class they purport to represent, may have against cigarette manufacturers. Indeed, plaintiffs in their complaint do not

assert that they have brought an action against cigarette manufacturers for smoking-related illnesses, upon which the Department could have filed a lien.

The distribution formula set out in subdivision 5 only applies when an action is brought by the injured medical assistance recipient. The formula does not apply to actions brought by the State. Even if the distribution statute were applicable, it would not support plaintiffs claim. Under the statute, the "plaintiff" must be paid at least one-third of the net settlement amount after attorney fees and costs are deducted. Mr. Brown and Mr. Bergeron were not plaintiffs in the State's tobacco lawsuit. Rather, the State itself was the plaintiff in that action, and it sought only its own damages, leaving plaintiffs' right to recover against the tobacco companies in tact.

Clearly, the Medicaid statute upon which Brown and Bergeron rely, does not provide a basis for their claim. The statute, on its face, would only apply if the plaintiffs had brought an action against the tobacco industry, upon which the State Department of Human Services had filed liens.

2. The Subrogation Provisions Of The General Assistance Medical Care Statute Do Not Support Plaintiffs' Complaint.

Plaintiffs also assert a right to a portion of the State's tobacco recovery under Minn. Stat. § 256D.03, subd. 8(f) (1996). The General Assistance Medical Care statute, upon which Brown and Bergeron rely, is not a lien statute, rather it is a subrogation statute.[10] The statute contains a distribution

[10] Minn. Stat. § 256.015 does provide the Department of Human Services with a lien on causes of action of General Assistance Medical Care recipients. That statute, however, was not raised by plaintiffs as a basis for their claims. Moreover, its language is virtually identical to the Medicaid lien statute and for the same reasons cannot support plaintiffs' action.

formula which applies when an injured General Assistance Medical Care recipient receives an award or settlement from a liable third party. The formula is very similar to that set out in the Medicaid lien statute.

> Upon any judgment, award, or settlement of a cause of action, or any part of it, upon which the state agency has a subrogation right, including compensation for liquidated, unliquidated or other damages, reasonable costs of collection, including attorney fees, must be deducted first. The full amount of ... general assistance medical care paid to or on behalf of the person as a result of the injury must be deducted next and paid to the state agency. The rest must be paid to the public assistance recipient or other plaintiff. The plaintiff, however, must receive at least one-third of the net recovery after attorney fees and collection costs.

Minn. Stat. § 256D.03, subd. 8(f) (1996) (emphasis added).

The distribution formula, set out above, applies only to proceeds from the resolution of a General Assistance Medical Care recipient's cause of action. Plaintiffs have not brought an action against the tobacco industry upon which the Department of Human Services' subrogation interest can attach. Nor did the State, in the tobacco litigation, sue as anyone's subrogee. The General Assistance Medical Care distribution formula, like the Medicaid statute, requires a "plaintiff" recipient, who recovers an award, to receive at least one-third of the net settlement as his/her individual damages. Mr. Brown and Mr. Bergeron brought no action, recovered no award and did not participate in the State's tobacco lawsuit, nor did the State purport to represent their interests or seek their individual damages. As a result, the General Assistance Medical Care distribution formula does not provide a basis for their claim.

Plaintiffs also assert that the Department, as a matter of course, files liens on all Medicaid and General Assistance Medical Care recipients. Under state law, liens are filed when the Department becomes aware that a welfare recipient has a cause of action against an individual or entity responsible for the injuries or required care. On the lien document, the Department must identify the person it has provided medical services to, the injury which required the care and the party that caused the injury. Minn. Stat. §§ 256.015, subd. 2; 256B.042, subd. 2 (1996). The Department is not required, and indeed, does not file liens for every medical assistance and General Assistance Medical Care payment it makes. Such a practice would severely burden court administrators with whom the liens are filed.

Clearly, the statutes which plaintiffs assert form the bases of their lawsuit, are inapplicable and cannot support their claims. The distribution formula set out in the Medicaid lien and General Assistance Medical Care subrogation statutes was enacted to provide welfare recipients with an incentive to pursue claims against liable third parties. Under the formula, Medicaid and General Assistance Medical Care recipients are guaranteed at least one-third of the net proceeds of any recovery obtained. Recipients are guaranteed one-third of the net award even if the Medicaid lien or General Assistance Medical Care subrogation interest is not fully satisfied. Without this financial guarantee, injured recipients would have little incentive to bring actions against the individuals responsible for their injuries, when their entire recovery would be used to repay the medical benefits received.

The plain language of the statutes shows that Brown and Bergeron and the class they seek to represent do not have a cause of action under Minn. Stat. § 256B.042, subd. 5 nor Minn. Stat. § 265D.03, subd. 8(f) (1996). Plaintiffs have failed to state a claim upon which relief can be granted and their complaint must be dismissed.

C. THE ESSENTIAL PREMISES OF THE COMPLAINT ARE SO DEMONSTRABLY FALSE, BASED ON PUBLIC RECORDS AND THE LAW OF THE TOBACCO LITIGATION, THAT PLAINTIFFS EITHER COMPLETELY FAILED TO INVESTIGATE THE TOBACCO LITIGATION OR DELIBERATELY MISCHARACTERIZED THE CASE. TO DETER SUCH BASELESS CLAIMS, THE COURT SHOULD FINE THE LAW FIRMS AND AWARD DEFENDANTS COSTS AND ATTORNEYS FEES.

There's no mystery about why this action was brought. The tobacco settlement is worth $6.17 billion over 25 years; plaintiffs and their lawyers have asked for the difference between the settlement and damage model amounts, "but not less than a third of the net recovery after attorneys fees and other collections costs." Under their theory of the case, plaintiffs are entitled to between $2.06 *billion* and $4.86 *billion.*[11] That's quite a return for plaintiffs who already had their health care expenses picked up by the State, and who still have their rights to sue the tobacco companies.

Indeed, the claim's very absurdity highlights the equal absurdity of their construction of the welfare statutes. To recover, plaintiffs and their lawyers must argue that the Legislature intended the Medicaid and General Assistance Medical Care statutes to pay for recipients' smoking-related health care expenses *and* remain free to sue the tobacco companies for their individual damages *and* enrich themselves at taxpayers' expense. But for the fact that the statute is clear on its face, and, therefore, needs no interpretation, such a claim would be resolved by the presumption of statutory construction that the Legislature

[11] One-third of the nominal value of the settlement = 1/3 x $6.17 billion = $2.06 billion. The difference between the settlement amount and the damage model amount = $6.17 billion less $1.31 billion = $4.86 billion.

does not intend an absurd result. *See* Minn. Stat. § 645.17 (1). ("The legislature does not intend a result that is absurd, impossible of execution, or unreasonable.") One cannot escape the feeling that the real tenor of this filing is: "Well, it's a loser, but with that much money at stake it's worth a shot." But the law demands more.

Minn. R. Civ. P 11 requires pleadings to be signed by at least one attorney, and provides that,

> "[t]he signature of an attorney or party constitutes a certification that the pleading . . .has been read; that to the best of the signer's knowledge, information and belief *formed after reasonable inquiry it is well grounded in fact and is warranted by existing law* or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation .... If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, *shall impose* upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing. . .including reasonable attorney fees."

Minn. R Civ. P. 11 (emphasis added).

The Minnesota Supreme Court thoroughly examined Rule 11, and laid down criteria for its application, in *Uselman v. Uselman,* 464 N.W.2d 130 (Minn. 1990). Noting that the Rule had been significantly amended to heighten the responsibilities of counsel, the Court expressed its "clear... view of the rule as a mechanism for deterrence rather than a punitive or cost-shifting device," which should be narrowly

construed so as not to deter "legitimate or arguably legitimate claims." 464 N.W.2d at 142. In a significant departure from past law, the amended rule did away with the old subjective, "bad faith" test, substituting an objective standard based "upon belief after reasonable inquiry" that a pleading is proper. *Id.* "In other words," the Court said, "an affirmative duty is imposed on counsel to investigate the factual and legal underpinnings of a pleading. Moreover, the imposition of sanctions is mandatory if the rule is violated."

The Court went on to impose both procedural and substantive standards, both of which are met in this litigation, to guide the trial courts in applying the rule. Procedurally, the Court required "fair notice" of the possibility of sanctions and the reasons therefore, and an opportunity to respond. *Uselman,* 464 N.W.2d at 143-4. Exhibit 1 is a July 22, 1998 letter to plaintiffs' counsel from Chief Deputy Attorney General Lee E. Sheehy advising them that the State regarded the lawsuit as frivolous, providing them with dispositive evidence (the Seconded Amended Complaint and the settlement documents), and demanding that the Complaint be withdrawn. Plaintiffs' counsel received the letter and, on July 27, 1998, replied that they intended to pursue the suit. Exhibit 2. The Sheehy letter, the State's July 31, 1998 Notice of Motion and Motion, and the briefing and scheduled hearings herein more than satisfy the procedural requirements of *Uselman.*

It is just as clear, that the factors which the *Uselman* Court laid down for evaluating sanctions are manifest in plaintiffs' complaint. The factors, *Uselman,* 464 N. W.2d at 143, and the facts of this case are as follows:

The first *Uselman* standard is: How *much time for investigation was available to the signers [of the Complaint]?* Almost four years, in the case of the facts which establish the legal nature of the Tobacco Litigation. That litigation was filed on August 17, 1994. By May 19, 1995, the trial court had rejected the tobacco companies' contention that the case

was, or should have been brought as, a derivative action. The court noted, with respect to a motion challenging the State's co-plaintiff's standing, that Blue Cross "is seeking relief independent from any that could be sought by smokers." Appendix 7 at p. 6. The Minnesota Supreme Court decisively upheld the direct action in July, 1996. *State of Minnesota v. Philip Morris, Incorporated, el al,* 551 N.W.2d 490. The trial court, in summary judgment orders laid to rest the tobacco industry's last hopes of even making any arguments based on derivative theories of recovery in January of this year. *See* Appendix 8.

These facts were hardly difficult to uncover. The Supreme Court opinion is in the Northwest Reporter. The District Court orders, and the relevant memoranda of the parties, have been continuously available to the public. Indeed, the trial court posted its orders on the Internet for all the world to read. *See* www.courts.state.nm.us/districts/second/tobacco/orders.html. No reasonable lawyer reading the Tobacco Complaint in 1994 would have believed that the State was prosecuting the action "in a representative capacity pursuant to Minn. Stat. § 256B.01, et seq. and Minn. Stat. §256D.03, subd. 3. . ." The Settlement Agreement and the Consent Judgment did not change the character of the case; they provide no basis whatsoever for concluding that the State got anything belonging to Medicaid and General Assistance recipients. Indeed, dispositive on this point is the completely contrary fact that no individual rights of action were released. *See* Settlement Agreement, Appendix 10 at para. III.B. Even now, the people these plaintiffs purport to represent are presumably members of a putative class pursuing recoveries against the tobacco companies. *See Thompson v. American Tobacco, Inc.,* File No. 3-96-CV888 (D. Minn.).

Finally, since plaintiffs' theory with respect to the putative Medicaid class is that the State proceeded under Minn. Stat. § 256B.042, subd. 5, which provides for the filings of liens against the rights of Medicaid recipients who

sue third-party tortfeasors, it should be noted that plaintiffs attorneys did in fact investigate whether the State had filed liens. Unfortunately, *they did so after filing the Complaint, and after the Sheehy letter.* Affidavit of Janice Taylor. A post-complaint investigation cannot satisfy *Uselman.*

The second *Uselman* standard is whether the attorneys signing the pleadings had to rely on a client for underlying information. Obviously they did not have to rely on clients for the flawed allegations -- really legal conclusions -- -which form the basis for their theory. The lawyers are completely accountable for the Complaint.

Third, *Uselman* asks whether the Complaint was based on a plausible view of the law. Elsewhere in this Memorandum the State examines the statutes on which plaintiffs rely -- and on which, the plaintiffs wrongly allege the State relied in pursuing the Tobacco Litigation. Putting aside the literal (and entirely fatal) falsity of this allegation and all that flows from the falsity, and taking the allegation as a claim that the statutes simply entitle them to money, one is left with the following question: How plausible it is that Minnesota law would let plaintiffs receive their welfare benefits, *and* sue the tobacco companies for their individual damages, *and* entitle them and their lawyers, neither of whom played any part whatsoever in the recovery, to between $2.06 and $4.86 *billion* of the State's tobacco settlement? How plausible is it that the law could in good faith be extended to such absurd lengths?

Finally, *Uselman* asks whether the attorney signing the pleadings depended on forwarding counsel or another member of the bar. There was no referral to plaintiffs' counsel after extensive litigation of the issues in this case, no reliance on the past work of others. Four lawyers signed the Complaint, five appear as counsel. Each had the opportunity to ascertain the facts; they either failed to investigate or ignored what they found. All were warned that the Complaint was baseless; all chose to proceed.

Applying the *Uselman* factors it is clear that plaintiffs and their attorneys did not perform what the Court found to be "an affirmative duty. . . to investigate the factual and legal underpinnings of" their Complaint. 464 N.W.2d at 142. Accordingly, the rule has been violated and an award of sanctions is mandatory. *Id.*

The final question is what the sanction should be. In *Uselman* the Supreme Court instructed that the purpose of Rule 11 is to deter abuses, and it provided a list of potential sanctions available to the courts, stating that "[t]he court should impose the least severe sanction necessary to effectuate the purpose of deterrence." 464 N.W.2d at 145.

This case is a naked grab for somebody else's dollars -- billions of them. The best way to deter a baseless grab for money is through money sanctions, and both fines and costs are specifically authorized by *Uselman,* 464 N.W.2d at 145. The State, therefore, urges the Court to grant the State its costs and attorneys fees, to fine each law firm an appropriate amount, and to impose such other sanctions as the Court finds would deter a consortium of three law firms from bringing a claim which represents an abuse of access to the courts.

CONCLUSION

Because plaintiffs' claim is without factual or legal basis, as they knew or should have known, the State's motion to dismiss and for sanctions should be granted.

Dated: 8/19/98

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

s/
THOMAS F. PURSELL

Senior Counsel
Atty. Reg. No. 12168X
Suite 1400, NCL Tower
445 Minnesota Street
St. Paul, Minnesota 55101-2131
(651) 296-7579 (Voice)
(651) 297-7206 (TTY)

s/
PATRICIA A. SONNENBERG
Assistant Attorney General
Atty. Reg. No. 148039
Suite 800, NCL Tower
445 Minnesota Street
St. Paul, Minnesota 55101-2131
(651) 296-2106 (Voice)
(651) 296-1410 (TTY)

ATTORNEYS FOR DEFENDANT
STATE OF MINNESOTA

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In The

Supreme Court of the United States

JESSE LEE BROWN and RONALD J. BERGERON, on behalf of themselves and all others similarly situated,

Petitioners,

v.

THE STATE OF MINNESOTA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Minnesota

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MICHAEL V. CIRESI
(*Counsel of Record*)
ROBERTA B. WALBURN
GARY L. WILSON
ROBINS, KAPLAN,
MILLER & CIRESI L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN
55402-2015
(612) 349-8500

MIKE HATCH
Minnesota Attorney General
PATRICIA A. SONNENBERG
Suite 900, NCL Tower
St. Paul, MN 55101
(651) 296-2106

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does the Court have jurisdiction given that the issues presented for review were not raised below (*see* petition 16)?

2. Does the Court have jurisdiction given that the decision below rests on independent and adequate state grounds – the interpretation of Minnesota statutes by the Minnesota Court of Appeals?

3. Does the putative class – whose alleged members did not and will not pay any of the medical costs recouped by the State of Minnesota and whose personal injury claims were not settled in the State's litigation against the tobacco industry – have a property interest or due process right that entitles them to recover payments made by the State of Minnesota on their behalf?

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JURISDICTION

Petitioners invoke 28 U.S.C. § 1257 as their basis for this Court's jurisdiction. Section 1257 does not convey jurisdiction because, as petitioners concede, the generic constitutional claims posed as the federal question required under section 1257 were not raised below. *See* Petition ("Pet.") 16 (admitting that the constitutional issues were "neither framed nor argued" below). With very rare exceptions not applicable here, this Court has "adhered to the rule that in reviewing state court judgments under 28 U.S.C. § 1257 [we] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 85 (1997).

In addition, jurisdiction is lacking because the petitioners sought relief in the Minnesota courts based upon Minnesota state statutes, Petitioners' Appendix ("A.") 101-05, and the Minnesota District Court and Court of Appeals denied those claims for relief on the basis of state law. Thus, the decision for which review is sought rests upon independent and adequate state grounds. *Michigan v. Long*, 463 U.S. 1032, 1040-42 (1983) (no jurisdiction to review state court opinion resting on state grounds).

STATUTORY PROVISIONS

Relevant statutory provisions not set forth in the petition are reproduced at Respondent's Appendix ("R.A.") 1.

STATEMENT OF THE CASE

The State of Minnesota's Tobacco Litigation

The underlying Minnesota tobacco litigation – the settlement and proceeds of which are at issue in the present petition – was filed by the State of Minnesota (with co-plaintiff Blue Cross and Blue Shield of Minnesota) in state court in 1994. The State's suit was a direct action, not derivative of any personal injury claims of smokers. All of the State's causes of action were asserted under Minnesota law, based upon the tobacco industry's breach of independent duties to the State (and Blue Cross), separate and apart from any duties the tobacco industry owed to injured smokers.[1] The State sued to recover monies that the State paid for smoking-related medical care provided to Medicaid (known as "Medical Assistance" under Minnesota statutes) and General Assistance recipients. The State also sought other monetary relief, including future and punitive damages, restitution for unjust enrichment, disgorgement of profits, funding for smoking cessation programs and civil penalties. Plaintiffs' Second Amended Complaint, State of Minnesota *et al.* v. Philip Morris, Inc., *et al.*

Throughout the litigation, the tobacco industry argued that the State (and Blue Cross) could not maintain

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[1] No individual smokers were parties or intervenors in the action, and the State did not seek damages on behalf of any smokers. Petitioner Brown was merely a paid volunteer for a third-party fact deposition noticed by the tobacco defendants.

a direct action but rather only derivative or subrogation claims, *i.e.*, "standing in the shoes" of injured smokers. The Minnesota Supreme Court put this issue to rest in 1996 by holding that Blue Cross, and by necessary implication the State, had direct causes of action against the tobacco industry. *State v. Philip Morris, Inc., et al.*, 551 N.W.2d 490 (Minn. 1996). The Minnesota Supreme Court noted that "Blue Cross seeks relief independent from that available to smokers, such as pain and suffering," *id.*, at 493, and held that Blue Cross could "join" the State in pursuing its consumer protection and antitrust statutory claims. *Id.* at 493, 495. Thus, at the close of evidence, the District Court instructed the jury that "this case is a direct action brought by the state of Minnesota and Blue Cross and Blue Shield of Minnesota. No individual smoker is a party to this action." R.A. 7-8.[2]

The Settlement of the State of Minnesota's Tobacco Litigation

The State of Minnesota, a pioneer in the Attorneys General tobacco litigation, reached a settlement on May 8, 1998, shortly before the jury was to begin deliberations. The settlement includes extensive injunctive relief against the tobacco industry and billions of dollars in payments

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[2] Petitioners' partial citation to the jury instructions on damages is misleading. Pet. 9. The instruction in full demonstrates that the State (and Blue Cross) were asserting direct claims. *See* A. 41 ("The term 'damages' means a sum of money that will fairly compensate the state of Minnesota and Blue Cross and Blue Shield of Minnesota for their payment of health-care costs caused by smoking.").

to the State in perpetuity. A. 55-86.[3] The State settled State claims – and not the personal injury claims of any smokers, including welfare recipients. This point is underscored in the Settlement Agreement and Stipulation for Entry of Consent Judgment ("Settlement Agreement"):

> The payments to be made by the Settling Defendants under this Settlement Agreement are **in satisfaction of all of the State of Minnesota's claims for damages incurred by the State** in the year of such payment or earlier years related to the subject matter of this action, including, without limitation, claims for equitable and injunctive relief, claims for health care expenditures and claims for punitive damages, except that no part of any payment under this Settlement Agreement is made in settlement of an actual or potential liability for a fine, penalty (civil or criminal) or enhanced damages.

A. 61 (emphasis added). The Settlement Agreement further provides that the State releases and discharges the tobacco defendants from claims:

> that **the State of Minnesota** (including any of its past, present or future administrators, representatives, employees, officers, attorneys, agents, representatives, officials acting in their official

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[3] The settlement monies being paid to the State are deposited in the General Fund and appropriated by the State Legislature. In 1999, the Legislature appropriated $968 million of the first $1.3 billion in settlement proceeds to two public health endowments. *See* Minn. Stat. §§ 16A.87, 62J.694 and Minn. Stat. § 144.395. In addition, approximately $200 million of the State's settlement is being dedicated to a non-profit foundation for tobacco control.

> capacities, agencies, departments, commissions, and divisions, and whether or not any such person or entity participates in the settlement), whether directly, indirectly, representatively, derivatively or in any other capacity ever had, now has or hereafter can, shall or may have . . .

A. 67 (emphasis added).

The Settlement Agreement also states that the rights of non-parties are not prejudiced:

> Except as expressly provided in this Settlement Agreement, no portion of this Settlement Agreement shall bind any non-party or determine, limit or prejudice the rights of any such person or entity.

A. 79.

In short, it is not accurate, as stated by petitioners, that the State "unilaterally settle[d] 70,000 Medicaid recipients' medical damages claims against the tobacco industry . . . " Pet. 3. Indeed, the petition fails to fully acknowledge that there is no dispute that class members have retained their rights to pursue their own personal injury claims against the tobacco industry and recover against the tobacco industry for their own personal injuries, including lost wages and pain and suffering. There is also no dispute that the only damages that class members cannot recover are medical costs paid by the State. A. 9.

The Litigation of State Issues in the Putative Welfare Recipient Class Action

Two months after the State's settlement, petitioners filed a putative class action in state court seeking as much

as two-thirds of the State's recovery. The suit demanded that the State pay the Medicaid and General Assistance recipients billions of dollars from the tobacco settlement for, *inter alia*, the payment of these bills by the State in the first instance.

The class action complaint focused on state – not federal – statutes. A. 95. The two counts in the Amended Complaint cite only state statutes, A. 101-104, and the prayer for relief cites only state welfare statutes for the division of proceeds (all of which – on their face – apply to claims brought by welfare recipients themselves, as opposed to direct claims brought by the State). *Id.*

Throughout the proceedings below, the federal Medicaid statutory scheme was referenced only as a backdrop to the state statutes, which provided the specific claims for relief. Significantly, the constitutional issues of taking of property and due process – the sole questions presented in the petition for review – were by petitioners' own admission "neither framed nor argued." Pet. 16.

Accordingly, the decisions of the District Court and the Minnesota Court of Appeals were based solely upon Minnesota law. The District Court found that:

> Minnesota statutes and the law of the tobacco case lead this court to conclude that plaintiffs' claims are wholly without support. The State of Minnesota and Blue Cross brought a *direct action* against the tobacco companies, a distinction that alone dictates the outcome.
>
> . . .
>
> Were plaintiffs able to recover under the statutes that this court believes are clearly inapplicable,

> they would be entitled to receive between $2.06 billion and $4.86 billion dollars, as compensation for medical expenses that they, for the most part, never incurred, an amount in *addition* to whatever amount any of the individual plaintiffs might receive for his or her compensable damages, such as pain and suffering. Their individual claims are not foreclosed by the settlement. Certainly that is an absurd result.

A. 31, 33 (emphasis in original).

The Minnesota Court of Appeals affirmed on the basis of state law.[4] The Court of Appeals noted that petitioners' alleged basis for recovery was state welfare statutes ("In this case, appellants' two-count complaint asserts statutory claims under the Minnesota medical-assistance and general assistance programs as the basis for recovery . . . "), and that the State's direct claims "did not implicate" and "were outside the scope" of the state welfare statutes. A. 8. Finally, the court held that even if the state welfare statutes were implicated, those state statutes "do not provide an avenue for the appellants to obtain a portion of the state's settlement." A. 8-9.

The petitioners assert that the constitutional issues were not presented below because the issue of future damages did not arise until the proceedings in the Minnesota Court of Appeals. Pet. 16 ("Until the State's admission related to future damages, and the Minnesota Court of Appeals' adoption of that admission, the constitutional

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[4] The Court of Appeals reversed the District Court's imposition of sanctions on petitioners' counsel. A. 12-13.

issues were neither framed nor argued.") This assertion is a substantial misstatement of the proceedings below.

The Settlement Agreement itself clearly encompassed future damages. *See, e.g.*, A. 66-67 (releasing tobacco companies from claims that the State "ever had, now has or hereafter can, shall or may have . . . "). In the District Court, the State stated that it had sued the tobacco companies for, *inter alia*, "past and future damages" (A. 117) and that the Settlement Agreement "provides not just for payment of past damages, but also for the ongoing harm caused to the State from the continuing use of tobacco products." A. 129. Indeed, the petition (contradicting itself) notes "the State's outright *admission* to the trial court that it had settled Petitioners' past and future medical damages claims." Pet. 14 (emphasis in original).[5]

Petitioners themselves also repeatedly recognized the issue of future damages from the outset of the proceedings below. For example, petitioners' statements to the District Court included the following:

• The settlement documents release the tobacco companies from not only the $1.3 billion of medical expense for 70,000 victims of smoking, but **future medical expense** and general expense for those same victims . . . " R.A. 11 (emphasis added).

• "There is no more claim for that medical expense. That has been forever discharged by the State for the 70,000 victims of smoking, either past expense **or future expense** . . . " R.A. 11-12 (emphasis added).

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[5] The State did settle the State's future claims, but not petitioners' own personal injury claims, past or future.

• "[T]he State brought, settled and released their claims for past and **future medical expenses** against liable third parties – the tobacco defendants." R.A. 14 (emphasis added).

• "Damages for past **and future costs** arising out of those claims have now been brought, settled, and forever compromised. . . . " R.A. 15 (emphasis added).

• "The State settled and released the past **and future medical expense claims** of all public assistance recipients. . . . " R.A. 17 (emphasis added).

In sum, it is a misstatement for petitioners to contend that "the State's position as to what it settled changed at each level of review," with future damages not being raised until the Minnesota Court of Appeals. Pet. 13 n.10. It is a further misstatement for the petition to contend that the Minnesota Court of Appeals' decision somehow raised a new issue regarding future damages. The Court of Appeals' decision merely noted that "[b]oth parties agree" that "the state's settlement precludes individual medical- and general-assistance recipients from pursuing claims for past or future health care costs covered by the state's medical- or general-assistance programs." A. 9.

REASONS FOR DENYING THE WRIT

1. There Is No Jurisdiction Because the Federal Issues Were Not Raised Below

Petitioners pose as federal questions takings and due process violations under the Fifth and Fourteenth Amendments to the United States Constitution. Pet. 1-2, 19-27. The opinion for which review is sought clearly

does not decide those issues. A. 2-14. Thus, petitioners must overcome the presumption that those arguments were not properly presented below. *Street v. New York*, 394 U.S. 576, 582 (1969); Supreme Court Rule 14.1(g)(i). Petitioners concede, however, that the constitutional issues posed in the petition were not raised before the trial court or the intermediate court of appeals. Pet. 16 ("the constitutional issues were neither framed nor argued" below).[6] This Court will not assume jurisdiction over federal claims raised for the first time in the petition for certiorari. *White River Lumber Co. v. Arkansas ex rel. Appelgate*, 279 U.S. 692, 700 (1929).

Petitioners appear to invoke the narrow exception that a federal claim may be considered adequately presented when a highest state court renders an unexpected interpretation of state law. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85-86 n.9 (1980); *see* Pet. 16. That theory is unavailing. First, petitioners' suggestion that the Minnesota Court of Appeals' ruling unexpectedly dealt with future claims is specious. As shown above, throughout the state court litigation, petitioners argued that future claims had been settled by the State. R.A. 11-12, 14-15, 17. Petitioners did file a petition to the Minnesota Supreme Court (R.A. 20), which was denied. *See Yee v. City of Escondido*, 503 U.S. 519, 532-34 (1992) (raising due process for the first time in unsuccessful petition for review to highest state court insufficient under 28 U.S.C.

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[6] The petition's loose language that the Court of Appeals found that there was no "taking" (Pet. 23) is contrary to both the record and the admissions elsewhere in the petition that the constitutional issues were not raised below.

§ 1257).[7] In that petition, while petitioners made vague references to "due process" and "unjust taking, due process and equal protection," (R.A. 25) only state law issues were posed as issues to be reviewed. R.A. 20-21.[8]

The requirement that a federal claim be presented below has been characterized both as jurisdictional and prudential. *Yee*, 503 U.S. at 533. Even treating the rule as prudential, the petition should be denied. It is not appropriate to disturb the finality of state court judgments on a

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[7] Any attempt by petitioners in reply to show that the federal constitutional claims were raised below would be without merit. *Adams*, 520 U.S. at 87 (1997) (requiring that the issue be raised in a manner proper under state procedure). Under Minnesota law, constitutional issues raised for the first time on appeal will not be considered. *Minnesota v. Modern Recycling*, 558 N.W.2d 770, 772 (Minn. Ct. App. 1997). Petitioners' failure to comply with Minnesota's procedural requirement constitutes an independent and adequate state ground on which the state court would have refused to consider the federal claims. *Webb v. Webb*, 451 U.S. 493, 498 n.4 (1981).

[8] Petitioners did not cite to the federal constitution in their petition to the Minnesota Supreme Court. Where parties in state proceedings plead causes of action based on language found in both federal and state constitutions or statutes, this Court has presumed that the parties were making reference to state law. *See Webb v. Webb*, 451 U.S. at 496-98 ("full faith and credit" deemed to refer to state law), *Bowe v. Scott*, 233 U.S. 658 (1914) ("due process" deemed to refer to clause in state constitution). The Minnesota Constitution has takings and due process clauses. *See* Minn. Const. Art. 1 § 13 (takings), §§ 6, 7 (due process). In fact, the present petition correctly does not contend that the federal issues of taking and due process were raised below. *See* Supreme Court Rule 14.1(g)(i) (requiring specification when the federal questions sought to be reviewed were raised).

federal ground that the state court did not consider. *Webb*, 451 U.S. at 501.

2. The Decision For Which the Petition Seeks Review Rests Upon Independent and Adequate State Grounds

The decision for which petitioners seek review rests solely on the interpretation of Minnesota statutes, and thus this Court's jurisdiction is further wanting. *See Michigan v. Long*, 463 U.S. 1032, 1040-42 (1983) (no jurisdiction to review state court opinion resting on state grounds). The Court of Appeals was correct in basing its decision solely on state law grounds as petitioners' Amended Complaint asserted only Minnesota statutes as a basis for relief. A. 101-105.

Here, petitioners emphasize the role of the federal Medicaid statutes in their claims. *See* Pet. 2, 15. Petitioners concede, however, that they made only "general references to federal law" in the state courts. Pet. 12. This Court's jurisdiction may not be invoked on the basis of passing references to federal statutes. *Black v. Cutter Laboratories*, 351 U.S. 292, 297-98 (1956).

In any event, the Minnesota Court of Appeals' construction of Minnesota law obviated any need to interpret the federal Medicaid statutes or post-hoc constitutional claims. The court rejected any construction of state law that would bring the federal Medicaid statutes into play, by finding that the state statutes to which the federal statutes are a background simply provided no basis for petitioners' suit. A. 8-9 (petitioners' claims "did not implicate the medical- and general-assistance statutes").

The court expressly stated that this holding was sufficient to support its opinion, P.A. 8-9, but in the alternative analyzed petitioners' claims as if the state statutory scheme they asserted was applicable (A. 9-12), and also disposed of those statutory claims on state law grounds. A. 11 ("[b]ased upon our interpretation of the [state] recovery-allocation statutes, we agree with the district court's dismissal of appellants' complaint"). There is no federal jurisdiction where a state court's construction of state law removes any federal question from the case. *See Fox Film v. Muller*, 296 U.S. 207, 210-11 (1935).

3. There Is No Conflict Among the Courts

Petitioners argue that there is a conflict among various courts. However, the cases petitioners offer as creating a conflict, *Floyd v. Thompson*, 227 F. 3d 1029 (7th Cir. 2000) and *State of California v. Superior Court*, 99 Cal. Rptr.2d 735 (Cal. App. 2000), reach the same result as the Minnesota Court of Appeals: all claims by putative classes of Medicaid recipients to any of the states' tobacco recoveries are rejected.[9] Lower court decisions across the

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[9] *Floyd v. Thompson*, 227 F. 3d 1029 (7th Cir. 2000) does not, as petitioners contend, hold that the State could settle only claims for past medical costs. *See* Pet. 24. Rather, the court found that the assignment in that case covered "the amounts the state pays," but not those "claims for medical services that were not covered by Medical Assistance," *i.e.*, medical expenses incurred by individuals, not the State. *Id.* at 1037. The Minnesota Court of Appeals drew this same conclusion. A. 9.

country also appear unanimous against petitioners' claims.[10]

The minor variations in the reasoning employed to reach identical results reflects not conflict between courts, but the state law nature of the issue. Each state has differing laws regarding third-party payments to recipients receiving assistance, therefore the analysis under those laws may differ slightly. Minnesota, in fact, entered into its own settlement with the tobacco industry and was not even part of the multi-state Master Settlement Agreement at issue in the other court decisions. Also, that there are multiple bases for rejecting claims akin to those pressed by petitioners merely shows that petitioners' claims are flawed in numerous respects. *See State of California*, 99 Cal. Rptr. 2d at 739 ("there are several problems with [plaintiffs'] analysis, any of which alone would defeat [recipient class'] claims"); *Strawser v. Lawton*, 126 F. Supp. 2d at ___, 2001 WL 8406, * 6 (dismissing claims of recipient class on the basis of 42 U.S.C. § 1396b(d)(3)(B)(ii), but noting that "[t]he Court has chosen but one of a host of analyses warranting dismissal of Plaintiffs' claims").

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[10] *See Strawser v. Lawton*, 126 F. Supp. 2d 994 (S.D.W.V. 2001); *Skillings v. Illinois*, 121 F. Supp. 2d 1235 (C.D. Ill. 2000); *Martin v. New Mexico*, 197 F.R.D. 694 (D. N.M. 2000); *Tyler v. Douglas*, ___ F. Supp. 2d ___, 2000 WL 1146575 (D. Vermont 2000); *Barton v. Summers*, 111 F. Supp. 2d 989 (M.D. Tenn. 2000); *Cardenas v. Anzai*, ___ F. Supp. 2d ___, 2001 WL 58857 (D. Haw. Jan. 18, 2001).

4. The Minnesota Court of Appeals Correctly Interpreted the Relevant Minnesota Statutes in Affirming Dismissal of Petitioners' Claims

The claims by the putative class rested upon the contention that state Medicaid and General Assistance statutes which deal with derivative claims – either via liens or subrogation by the State – were applicable. As explained at length above, the State filed a direct action against the tobacco industry and did not assert as a basis for recovery the welfare statutes cited by petitioners, or any other derivative rights.

A. Minnesota's Medicaid and General Assistance Statutory Schemes

In Minnesota, two programs – Medicaid and General Assistance – provide publicly-funded medical care to persons in need. Medicaid is a joint federal-state program that is administered on the state level. The federal statutes and regulations set broad parameters for the program. *See* 42 U.S.C. § 1396, *et seq.* Minnesota statutes enacted to administer the program are consistent with the federal rules. *See* 42 C.F.R. 430.10, *et seq.* (state plans must conform with federal requirements); *Lundberg v. Jeep Corp.*, 582 N.W.2d 268, 270 (Minn. App. 1996) ("Minn. Stat. § 256B.042 complies with the federal requirements . . . ").

General Assistance is solely a state-funded program. The Minnesota General Assistance program is neither reviewed nor approved by the federal government.

Both the Medicaid and General Assistance statutes require recipients to assign to the State their rights to recover medical expenses from third parties as a condition of receiving medical benefits. This assignment is consistent with the aim of reducing the burden on taxpayers since the government – and not the recipients – pays for the care. Thus, Minn. Stat. § 256B.056, subd. 6 mandates that a person, by signing an application for Medicaid "assigns to the department of human services all rights that person may have to . . . payments for medical expenses from any other." *See also* 42 U.S.C. § 1396k(a)(1)(A) (state plans to include assignment provisions). Similarly, a recipient of General Assistance "assigns to the department of human services all rights to medical support or payments for medical expenses from another person or entity." Minn. Stat. § 256D.03, subd. 3a.

The state Medicaid and General Assistance statutes provide for various options for the State to recover taxpayer dollars through claims derivative of the rights of welfare recipients. Petitioners asserted three statutes as the basis of their claims in their amended complaint: 1) Minn. Stat. § 256B.042 (providing authority for liens for the State under the Medicaid program); 2) Minn. Stat. § 256B.37 (providing authority for subrogation rights for the State under the Medicaid program); and 3) Minn. Stat. § 256D.03 (providing authority for subrogation rights for the State under the General Assistance program).

The cited lien and subrogation provisions have similar formulas as to how recoveries obtained pursuant to these provisions are to be distributed. The lien statute provides:

> Costs Deducted. Upon any judgment, award, or settlement of a cause of action, or any part of it, **upon which the state agency has filed its lien**, including compensation for liquidated, unliquidated, or other damages, reasonable costs of collection, including attorney fees, must be deducted first. The full amount of medical assistance paid to or on behalf of the person as a result of the injury must be deducted next, and paid to the state agency. The rest must be paid to the medical assistance recipient or other plaintiff. **The plaintiff**, however, must receive at least one-third of the net recovery after attorney fees and other collection costs.

Minn. Stat. § 256B.042, subd. 5 (emphasis added). The distribution formula for cases where an agency has asserted a Medicaid subrogation interest contains the same language, except that it expressly applies to judgments, awards or settlements "upon which the state agency has a subrogation right." Minn. Stat. § 256B.37, subd. 4. The General Assistance formula is virtually identical. Minn. Stat. § 256D.03, subd. 8 (f).

B. The Distribution Formulas in the Welfare Statutes Do Not Apply To The State's Tobacco Settlement

The Minnesota Court of Appeals correctly found that the State of Minnesota's claims against the tobacco industry did not implicate the state statutes upon which petitioners rely. A. 8. The State prosecuted its claims through a direct action, asserting only its own rights, not derivative (or what the petitioners refer to, inaccurately, as "shared rights"). The State neither filed nor asserted liens

or subrogation interests.[11] The State was free to proceed in a direct action as, under Minnesota law, a statutory cause of action is cumulative of other remedies unless the statute clearly provides otherwise. *See, e.g., In re Shetsky*, 239 Minn. 463, 469, 60 N.W.2d 40, 45 (1953) ("An existing common-law remedy is not to be taken away by a statute except by express wording or necessary implication."). Indeed, in response to the identical argument by the tobacco companies that the State's case was a derivative one asserting subrogation interests, the Minnesota Supreme Court recognized that the State's action was a direct one: "Blue Cross [which filed a consolidated complaint pleading identical causes of action as the State] seeks relief independent from that available to smokers, such as pain and suffering" and Blue Cross can "join the State of Minnesota in pursuit of relief for these claims." *State v. Philip Morris*, 551 N.W.2d at 492, 495.

In any event, even if the state statutes pursued by petitioners were applicable, the rejection of petitioners' claims by the Minnesota courts was correct. As the Minnesota Court of Appeals found, the recovery allocation provisions of those statutes do not allow allocation of any share of the State's settlement to petitioners. A. 8-12. The

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[11] Petitioners' repeated assertions that the State has not waived its lien or subrogation interests and that petitioners are therefore at risk for reimbursement to the State are not accurate. The State specifically acknowledged below that it would not have rights to recoup State-paid medical care in personal injury cases brought by recipients against the tobacco industry. R.A. 32 ("the State doesn't have a right to a penny . . . "); R.A. 35 ("[T]he State would not have claim out of any recovery by welfare recipient/smokers . . . ").

three distribution formulas at issue on their face are dispositive of petitioners' claims. First, the distribution formulas expressly apply only where liens or subrogation interests are involved. Minn. Stat. § 256B.042, subd. 5 applies where "**the state has filed its lien. . . .** " (emphasis added). Both Minn. Stat. § 256B.37, subd. 4 and Minn. Stat. § 256D.03, subd. 8(f) apply only to "any judgment, award, or settlement of a cause of action, or any part of it **upon which the state agency has a subrogation right . . .** " (emphasis added). The State has no such lien or subrogation rights in the tobacco settlement because that settlement was for the State's own injuries.

Moreover, the final sentence of each of the three formula statutes is identical, and further precludes any recovery by petitioners:

> **The plaintiff**, however, must receive at least one-third of the net recovery after attorney fees and other collection costs.

Minn. Stat. § 256B.042, subd. 5, Minn. Stat. § 256B.37, subd. 4, and Minn. Stat. § 256D.03, subd. 8(f) (emphasis added). In the present case, petitioners were not plaintiffs in any claim or lawsuit producing a recovery against the tobacco industry.[12]

The explicit statutory language which precludes petitioners' claims is supported by sound policy. The welfare statutes provide the State with authority to recoup taxpayers' monies from third parties. To this end, welfare

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[12] The petition inaccurately states that "**the injured party** is guaranteed 33 1/3 percent of the net recovery . . . " Pet. 8 (emphasis added). The state statutes use the term "plaintiff."

recipients must assign their claims against third parties to the State. The distribution formulas provide a limited exception to this general scheme in order to encourage recipients to bring actions against third parties responsible for their injuries by insuring that at least one-third of the recovery goes to the "plaintiff," even in cases where a lien or subrogation interest asserted by the State might otherwise be so large as to completely eviscerate the recipient-plaintiff's recovery. In the present case, the recipients' personal injury claims – for pain and suffering, lost wages, etc. – remain intact since they were not implicated in the State's settlement.

5. Federal Legislation Subsequent to the Tobacco Settlement Confirms That Petitioners Have No Claim To The State's Settlement

The federal Medicaid statutes cited in the petition also provide petitioners no relief, as they are neither inconsistent with the state Medicaid statutes nor specifically asserted by petitioners below as a basis for relief.[13] Moreover, in May 1999 Congress amended the Medicaid laws – specifically with respect to State settlements with the tobacco industry – to confirm that federal law entitles States to retain the full amount of their respective settlements.

First, the amendment restricted any right the federal government arguably might have had to receive its portion of Medicaid funding:

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[13] Of course, the federal Medicaid statutes are not applicable to petitioners' state General Assistance claims.

> (B)(i) Subparagraph (A) and paragraph (2)(B) [providing for federal recoupment] shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products . . . and State Attorneys General, or as part of any individual State settlement or judgment reached in litigation initiated or pursued by a State against one or more such manufacturers . . .

42 U.S.C. § 1396b(d)(3)(B)(i). Congress also made it clear that the funds were to be unencumbered by other claims, including those pressed by petitioners:

> (B)(ii) Except as provided in subsection (i)(19) [which allows payment of administrative costs associated with bringing suits against the tobacco industry] **a State may use amounts recovered or paid to the State as part of a comprehensive or individual settlement . . . for any expenditures deemed appropriate by the State.**

42 U.S.C. § 1396b(d)(3)(B)(ii) (emphasis added). Thus, Congress has made it clear that there is no federal law claim by either recipients or the federal government to a share of a State's settlement. *See Strawser*, 126 F. Supp. 2d at ___, 2001 WL 8406, at * 6 (the amendment at 42 U.S.C. § 1396b(d)(3)(B)(ii) gives the states "a complete right, title and interest to the settlement proceeds" and defeats any claim that the refusal to share the proceeds with a recipient class is a violation of federal law); *Tyler*, 2000 WL 1146575, * 2 (in light of the amendment, the Vermont

putative recipient class has failed to allege a violation of federal law).[14]

6. Petitioners' Post-Hoc Constitutional Arguments Have No Merit

Petitioners' claim of an unconstitutional taking rests on their unsupported assertions that petitioners retained a property interest in any future claims for tobacco-related medical costs, even if those claims are paid by the State. *See* Pet. 19-22. Of course, since the State of Minnesota's case was brought independently of the asserted statutes, and resulted in the settlement of the State's claims, not those owned by the recipients, petitioners' argument fails. But even if the Minnesota statutes did apply, petitioners' argument would be contrary to the statutes. Throughout their petition, and always without citation, petitioners argue that a recipient's assignment of rights to the State that was a prerequisite for participation in the welfare programs is limited to claims for past medical costs. *See, e.g.*, Pet. 16-17 ("Petitioners entered into a contract of assignment with the State thereby creating a right of the State to a lien and subrogation interest in the right to payment for *past* medical costs only."); *see also* Pet. 21-22. Purportedly, all claims for future medical costs, notwithstanding that those claims would also be

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[14] Petitioners cite this statute in their petition but note only the portion which addresses any federal government claims to the settlement proceeds, failing to note the portion which addresses other claims, including their own. Pet. 9 n.6. Petitioners never raised a constitutional argument below with respect to this statute.

program costs paid by the State of Minnesota, remained causes of action vested in the recipients, and form the alleged "property interest" for petitioners' generic constitutional allegations. *See* Pet. 22.[15]

The Minnesota statutes do not, however, carve out past claims that are assigned and future claims that are not assigned. The assignment to the State is of "all rights" to payments on a recipient's behalf. See Minn. Stat. § 256B.056, subd. 6 ("a person assigns to the department of human services *all rights* to medical support or payments for medical expenses from another person or entity . . . ") (emphasis added); *see also* Minn. Stat. § 256D.03, subd. 3(a) ("a person assigns to the department of human services *all rights* to medical support or payments for medical expenses from any other person or entity . . . ") (emphasis added); 42 U.S.C. § 1396k(a)(1)(A) (state must require recipient to assign "any rights"). Indeed, the structure of the assignment statutes rules out petitioners' distinction between past and future medical cost claims. The assignments occur at the time the recipient applies for benefits. Minn. Stat. § 256D.03, subd. 3(a) ("By signing an application for general assistance, a person assigns . . . "); *see also* Minn. Stat. § 256B.056, subd. 6 (same). Therefore, the statutes' assignment is forward looking and anticipates the assignment of future claims, as any past claims (excluding those subject to the three

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[15] Petitioners contradict their own argument that only past claims were assigned when they contrast Minnesota's statutory scheme to that of Wisconsin. Petitioners claim that in Wisconsin, there is no assignment of future costs, then state that "in stark contrast," the rights of the State of Minnesota run to "all causes of action, or any part thereto." Pet. 24.

month look-back provision in § 256B.056, subd. 6) would arise before the recipient becomes part of the program and assigns his or her claims.[16]

Even without these assignment statutes, generally recoupment for the payment of medical costs rests ultimately with the entity which paid the medical bills under Minnesota law. For example, the Minnesota collateral source statute, Minn. Stat. § 548.36, provides that payments made on a plaintiff's behalf by, *inter alia*, a "public program providing medical expenses" or by "health, accident and sickness, or automobile accident insurance" that are not subject to an asserted claim of subrogation are eliminated from a personal injury award.

The due process cases cited by petitioners establish that the "hallmark of property . . . is individual entitlement grounded in state law." *Logan v. Zimmerman*, 455 U.S. 422, 430 (1982); *see also Perry v. Sindermann*, 408 U.S. 593, 602 n.7 (1972) ("[p]roperty interests . . . are created

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[16] Petitioners' attempted distinction between the assignment of their "right to payment" – which they concede occurs (Pet. 15) – and the assignment of their "claim" – which they refute (*id.*) – is spurious. The Minnesota Court of Appeals refers both to the assignment of "**any claim** . . . for medical expenses . . . " and "**the legal right** to recover the medical expenses . . . " A. 10 (emphasis added), in implicit recognition of the fact that the terminology makes no difference. In fact, in the state District Court, petitioners conceded that, " . . . the State is required to obtain an assignment from each Medical Assistance recipient as to **any rights** he or she may have against third parties . . . " R.A. 17 (emphasis added). Moreover, the goal of petitioners' class action is to "receive payment," a right they admit was assigned to the State in exchange for the State making payments on the recipients' behalf.

and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law"). Here, the state statutes that prevent petitioners from reaping their claimed windfall are "merely one aspect of the State's definition of [the] property interest." *Martinez v. California*, 444 U.S. 277, 282 n.5 (1980) (legislature's adoption of an immunity defense is not a "taking," rather it is the state law's shaping of the property interest); *see also Logan*, 455 U.S. at 432-433 (a welfare recipient is not deprived of due process when a legislature adjusts benefit levels; the legislative determination provides all process that is due). Thus, there has been no "taking" of any "property." As the Minnesota Court of Appeals found, petitioners "currently have the same rights they had prior to the tobacco settlement. They have the right to bring a claim for damages against the tobacco defendants, but they do not have the right to retain the damages representing the state-paid medical expenses." A. 10. Since Minnesota and federal law does not extend them that right in the first instance, nothing has been taken from them.

CONCLUSION

The petition should be denied. Petitioners provide no basis for this Court's certiorari jurisdiction.

Dated this 19th day of March, 2001

Respectfully submitted,

MICHAEL V. CIRESI
(*Counsel of Record*)
ROBERTA B. WALBURN
GARY L. WILSON
ROBINS, KAPLAN,
MILLER & CIRESI L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN
55402-2015
(612) 349-8500

MIKE HATCH
Minnesota Attorney
General
PATRICIA A. SONNENBERG
Suite 900, NCL Tower
St. Paul, MN 55101
(651) 296-2106

Counsel for Respondent

APPENDIX

STATUTORY PROVISIONS

256B.042. Third party liability [Medical Assistance for Needy Persons]

Subd. 1. Lien for cost of care. When the state agency provides, pays for, or becomes liable for medical care, it shall have a lien for the cost of the care upon any and all causes of action or recovery rights under any policy plan, or contract providing benefits for health care or injury, which accrue to the person to whom the care was furnished, or to the person's legal representatives, as a result of the illness or injuries which necessitated the medical care.

Subd. 3. The attorney general shall represent the state agency to enforce the lien created under this section or, if no action has been brought, may initiate and prosecute an independent action on behalf of the state agency against a person, firm, or corporation that may be liable to the person to whom the care was furnished.

Subd. 5. Costs deducted. Upon any judgment, award, or settlement of a cause of action, or any part of it, upon which the state agency has filed its lien, including compensation for liquidated, unliquidated, or other damages, reasonable costs of collection, including attorney fees, must be deducted first. The full amount of medical assistance paid to or on behalf of the person as a result of the injury must be deducted next, and paid to the state agency. The rest must be paid to the medical assistance recipient or other plaintiff. The plaintiff, however, must

receive at least one-third of the net recovery after attorney fees and other collection costs.

256B.056. [Medical Assistance for Needy Persons]

Subd. 6. Assignment of benefits. To be eligible for medical assistance a person must have applied or must agree to apply all proceeds received or receivable by the person or the person's spouse from any third person liable for the costs of medical care for the person, the spouse, and children. The state agency shall require from any applicant or recipient of medical assistance the assignment of any rights to medical support and third party payments. Persons must cooperate with the state in establishing paternity and obtaining third party payments. By signing an application for medical assistance, a person assigns to the department of human services all rights the person may have to medical support or payments for medical expenses from any other person or entity on their own or their dependent's behalf and agrees to cooperate with the state in establishing paternity and obtaining third party payments. Any rights or amounts so assigned shall be applied against the cost of medical care paid for under this chapter. Any assignment takes effect upon the determination that the applicant is eligible for medical assistance and up to three months prior to the date of application if the applicant is determined eligible for and receives medical assistance benefits. The application must contain a statement explaining this assignment . . .

256B.37. Private insurance policies, causes of action [Medical Assistance for Needy Persons]

Subd. 1. Subrogation. Upon furnishing medical assistance to any person who has private accident or health care coverage, or receives or has a right to receive health or medical care from any type of organization or entity, or has a cause of action arising out of an occurrence that necessitated the payment of medical assistance, the state agency or the state agency's agent shall be subrogated, to the extent of the cost of medical care furnished, to any rights the person may have under the terms of the coverage, or against the organization or entity providing or liable to provide health or medical care, or under the cause of action. The right of subrogation created in this section includes all portions of the cause of action, notwithstanding any settlement allocation or apportionment that purports to dispose of portions of the cause of action not subject to subrogation.

Subd. 2. Civil action for recovery. To recover under this section, the attorney general may institute or join a civil action to enforce the subrogation rights established under this section.

Subd. 4. Recovery. Upon any judgment, award, or settlement of a cause of action, or any part of it, upon which the state agency has a subrogation right, including compensation for liquidated, unliquidated, or other damages, reasonable costs of collection, including attorney fees, must be deducted first. The full amount of medical

assistance paid to or on behalf of the person as a result of the injury must be deducted next and paid to the state agency. The rest must be paid to the medical assistance recipient or other plaintiff. The plaintiff, however, must receive at least one-third of the net recovery after attorney fees and collection costs.

256D.03. Responsibility to provide general assistance

Subd. 3(a). Claims; assignment of benefits. Claims must be filed pursuant to section 256D.16. General assistance medical care applicants and recipients must apply or agree to apply third party health and accident benefits to the costs of medical care. They must cooperate with the state in establishing paternity and obtaining third party payments. By signing an application for general assistance, a person assigns to the department of human services all rights to medical support or payments for medical expenses from another person or entity on their own or their dependent's behalf and agrees to cooperate with the state in establishing paternity and obtaining third party payments. The application shall contain a statement explaining the assignment. Any rights or amounts assigned shall be applied against the cost of medical care paid for under this chapter. An assignment is effective on the date general assistance medical care eligibility takes effect . . .

Subd. 8(c). Upon furnishing general assistance medical care or general assistance to any person having private accident or health care coverage, or having a cause

of action arising out of an occurrence that necessitated the payment of assistance, the state agency shall be subrogated, to the extent of the cost of medical care, subsistence, or other payments furnished, to any rights the person may have under the terms of the coverage or under the cause of action.

This right of subrogation includes all portions of the cause of action, notwithstanding any settlement allocation or apportionment that purports to dispose of portions of the cause of action not subject to subrogation.

Subd. 8(d). To recover under this section, the attorney general may institute or join a civil action to enforce the subrogation rights established under this section.

Subd. 8(f). Upon any judgment, award, or settlement of a cause of action, or any part of it, upon which the state agency has a subrogation right, including compensation for liquidated, unliquidated, or other damages, reasonable costs of collection, including attorney fees, must be deducted first. The full amount of general assistance or general assistance medical care paid to or on behalf of the person as a result of the injury must be deducted next and paid to the state agency. The rest must be paid to the public assistance recipient or other plaintiff. The plaintiff, however, must receive at least one-third of the net recovery after attorney fees and collection costs.

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42 USC § 1396b

(d)(3)(A) The pro rata share to which the United States is equitably entitled, as determined by the Secretary, of the net amount recovered during any quarter by the State or any political subdivision thereof with respect to medical assistance furnished under the State plan shall be considered an overpayment to be adjusted under this subsection.

(B)(i) Subparagraph (A) and paragraph (2)(B) shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products, as defined in section 5702(d) of Title 26 [26 U.S.C.A. § 5702(d)], and State Attorney General, or as part of any individual State settlement or judgment reached in litigation initiated or pursued by a State against one or more such manufacturers.

(ii) Except as provided in subsection (i)(19), a State may use amounts recovered or paid to the State as part of a comprehensive or individual settlement, or a judgment, described in clause (i) for any expenditures determined appropriate by the State.

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

The State of Minnesota,
by Hubert H. Humphrey, III,
its attorney general,
and
Blue Cross and Blue Shield
of Minnesota,

Plaintiffs,

vs. File No. C1-94-8565

Philip Morris Incorporated, R.J.
Reynolds Tobacco Company, Brown
& Williamson Tobacco Corporation,
B.A.T. Industries P.L.C., Lorillard
Tobacco Company, The American
Tobacco Company, Liggett Group, Inc.,
The Council for Tobacco Research – U.S.A.,
Inc., and the Tobacco Institute, Inc.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME 77, PAGES 15559 - 15667

May 6, 1998

* * *

JURY CHARGE

[15643] You are instructed that this case is a direct [15644] action brought by the state of Minnesota and Blue Cross and Blue Shield of Minnesota. No individual smoker is a party to this action. The actions of individual smokers do

not insulate defendants from liability since the actions of smokers; for example, the fact that they smoke, are both foreseeable by defendants and in accord with defendants' intention for use of their product. Any knowledge by smokers of any health risks of cigarettes or any conduct of the smokers is not a defense as to whether a defendant or defendants have violated the law in this case.

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Jesse Lee Brown, and Ronald J. Bergerson, on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

State of Minnesota,

Defendant.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

File No. 98-11152

The above-entitled matter came on for hearing before the Honorable H. Peter Albrecht, Judge of the above Court, at the Brookdale Courthouse, Brooklyn Center, Minnesota, on the 16th day of September, 1998.

* * *

[3] Summary judgment motion or summary judgment motion so between Mr. Ciresi and myself, we'll go first.

MR. CIRESI: We agreed that the defendants or the plaintiffs can go first, Your Honor, but that doesn't convert procedurally our motion into a summary judgment motion. It's still a 12.02 motion.

THE COURT: Let me ask this, are we in agreement that the motions are so similar and so overlapped that we'll just go ahead and the plaintiffs would argue completely, short of the sanctions issue, or you can do

that if you want, and then the State would go ahead and argue?

MR. CIRESI: That's correct.

THE COURT: Thanks. Mr. Plunkett.

MR. PLUNKETT: Thank you, Your Honor. I still contend in their pleadings that they acknowledge that this can go forward as a summary judgment motion. I know the Court's not going to find this easy to see but without a pedestal I'll try to refer to it.

Your Honor, my partner and co-counsel and I are here on behalf of our client and 70,000 victims of smoking to ask that their rights be declared under two separate provisions of the Minnesota Statutes, the Medicaid and the General Assistance Medical Care statutes and three separate sections under those,

* * *

[5] programs were two of the sources of compensatory damages which the State sought in the tobacco lawsuits. That's in their opposition brief, Your Honor. The Medicaid and General Assistance medical expense of 70,000 victims of smoking was pled in the complaint as a basis for their claim against the tobacco companies. The whole damage claim at trial $1.3 billion based on the testimony of Dr. Wyant and other experts was premised on the medical expenses arising under those statutes for the 70,000 victims of smoking. The settlement agreement delineates payment of $1.3 billion for those very claims. This is the full Medical Assistance and General Assistance claim of the State arising out of the expenses

incurred for our clients' illnesses. The settlement documents release the tobacco companies from not only the $1.3 billion of medical expense for 70,000 victims of smoking, but future medical expense and general expense for those same victims, and therein lies the rub, Your Honor. What has happened is the State has cut away a safety net that has been provided to those 70,000 victims. That safety net was mandated by the legislature.

Now, Your Honor, the provisions I cited to you before are the ones at issue here and let me explain how that safety net works. These statutes are

* * *

[7] order to be entitled to one-third. Well, that is false, Your Honor. The opening paragraph says, "Upon judgment, award, or settlement of a cause of action or any part of it."

Now, you can certainly have a settlement without being a plaintiff in a lawsuit. It happens every day, throughout the country. They have argued in their brief that you must have brought a lawsuit. Settlement doesn't require a lawsuit, Your Honor, and still the formula applies.

Now, the problem here and as stated by the State in their brief, recipients are guaranteed one-third of the net award even if the Medicaid lien or General Assistance medical care subrogation interest is not fully satisfied. That is the safety net that the legislature put in for these recipients. There is no more claim for that medical expense. That has been forever discharged by the State for the 70,000 victims of smoking, either past expense or

future expense, that guarantee has been taken away from them. If this is the only recovery that is ever made on behalf of these Medical Assistance recipients, than they will have lost the right to one-third of that amount, which they had guaranteed by the legislature. It's not absurd to assume that that is the case because assume, for

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT
Case Type: Declaratory Judgment

JESSE LEE BROWN and RONALD J. BERGERON, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

THE STATE OF MINNESOTA,

Defendant.

Court File No.: 98-11152

EXCERPTS FROM PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND FOR SANCTIONS

* * *

based upon a variety of legal theories. The State set out to prove that the tobacco industry illegally conspired to suppress research on the adverse health effects of smoking, that it manipulated the nicotine levels in cigarettes to induce addiction in smokers, and thereby caused smoking-related illnesses in countless Minnesotans. Despite the wide-ranging monetary relief it pled in the abstract, the State's actual evidence on economic injury was narrow and focused. In fact, the only damages evidence the State brought to the jury on the topic was a statistical model as to the amount of money it spent to treat approximately 70,000 adult participants in the State's Medical Assistance and General Assistance programs (hereinafter collectively referred to as "public assistance recipients")

who were treated for smoking-related illnesses during the years 1978 through 1996.[3] Based upon its expert testimony at trial, the State's economic damages totaled $1.31 billion.

The Tobacco Litigation was settled on May 8, 1998. In exchange for its broad release and discharge of every conceivable cause of action that was asserted or could have been asserted against the tobacco defendants, the State will receive a "perpetual stream of payments" estimated to total at least $6.17 billion over the next 25 years. *See* Settlement Agreement and Stipulation for Entry of Consent Judgment (hereinafter referred to as the "Settlement Agreement") (Exhibit 6[4]). Plaintiffs, and the 70,000 members of the plaintiff class, submit that they are entitled to their share of the proceeds from the tobacco settlement because the State brought, settled and released their claims for past and future medical expenses against liable third parties – the tobacco defendants.

Against the backdrop of the Tobacco Litigation is the statutory framework pursuant to which public assistant [sic] recipients make their claim of right. These statutes

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[3] The jurors were so instructed by the judge at the conclusion of trial: "The term 'damages' means a sum of money that will fairly compensate the State of Minnesota and Blue Cross and Blue Shield of Minnesota for their payment of health-care costs caused by smoking." Appendix 9 to the State's Memorandum of Law at p. 15659, lines 7-10.

[4] "Exhibit ___" references the numbered Exhibits attached to the Affidavit of Robert K. Shelquist submitted in support of Plaintiffs' Memorandum of Law in Support of Their Motion for Partial Summary Judgment, filed with the Court on August 19, 1998.

unequivocally state that upon receipt of medical treatment paid for by the State, all causes of action that the injured recipient might have against liable third parties is automatically conveyed, in part, to the State resulting in what the State itself has described as joint ownership. In essence, the State and the recipient become much like joint tenants of real property. They have shared interests in legal rights. For this reason, the public assistance statutes explicitly authorize the State, at its option, to bring a direct action in its own name against liable third parties to recover its public assistance cost, while protecting the injured recipients by allowing them to share in any recovery resulting from the State's pursuit of those jointly owned claims.

When the plaintiff and class members were treated for smoking-related illnesses between 1978 to 1996, certain causes of action against the tobacco defendants arose in their favor – claims jointly owned with the State to protect the State's subrogation and lien interests by virtue of the Medical Assistance and General Assistance statutes. Damages for past and future costs arising out of those claims have now been brought, settled, and forever compromised resulting in a windfall to the State. The plaintiffs and class members who have paid and continue to pay cigarette taxes, have received nothing.

Fortunately, this harsh result was anticipated by the Legislature and mitigated by the public assistance statutes. Both the Medical Assistance and General Assistance statutes contain specific distribution formulae for allocating the proceedings of a judgment, award or settlement of all or any part of a jointly-owned cause of action between the State and the recipient. The formulae represent the

Legislature's attempt to balance competing public interests of compensating the State for medical costs advanced, with compensating the public assistance recipient who has been injured by the acts of a third party. In short, reasonable costs of collection, including attorneys fees are deducted first, followed by a deduction of the full amount of medical costs paid on behalf of the recipient. The rest of the money, the statutes command, must be paid to the recipient or other plaintiff (such as the recipient's personal representative, guardian or next of kin). In no event, however, can the public assistance recipient recover less than one-third of the amount of the net recovery after deduction of attorneys fees and other collection costs. *See* Minn. Stat. §§ 256B.042, subd. 5; 256B.37, subd. 4; and 256D.03, subd. 8(f). Under these distribution formulae, plaintiffs have requested this Court to declare each party's rights, status, legal relations and liabilities.

Assuming that plaintiffs' allegations are true,[5] as this Court must do when considering the merits of a motion under Minn. R. Civ.P. 12.02(e), plaintiffs' Amended Complaint for declaratory relief sets forth legally sufficient claims for relief. For this reason, the State's Motion to Dismiss and for Sanctions should be denied.

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[5] Plaintiffs have proven each of the allegations in their Amended Complaint by way of the affidavit submitted in conjunction with their cross motion for summary judgment.

II. STATEMENT OF FACTS

The State's Medical Assistance program is funded by both state and federal money. As a condition for receiving matching contributions from the federal government, the State is required to obtain an assignment from each Medical Assistance recipient as to any rights he or she may have against third parties responsible for causing the illness necessitating the medical care. *See* 42 U.S.C. § 1396k and 42 C.F.R. § 435.610. The Minnesota Legislature satisfied this mandate by enacting

* * *

the Tobacco Litigation was based upon and arose out of the public *recipients'* causes of action in whole or in part – It did, the settlement did, and the recovery did.

4. "Nothing in the settlement in any way affects the claims of individual smokers, be they public assistance recipients or otherwise"

False as to the recipients, but true as to members of the general smoking public. The State settled and released the past and future medical expense claims of all public assistance recipients with whom it shared causes of action against the third party tobacco defendants. It is, therefore, quite obvious that the settlement adversely impacted the individual claims of public assistance smokers.

The State did not share the ownership of third party causes of action held by members of the general smoking public, as no subrogation or lien interests were created by the public assistance statutes. Accordingly, smokers

within the general population are not adversely impacted by the tobacco settlement, and nothing in the settlement would affect their individual claims. Smoking members of the general public with private health insurance, as opposed to Medical or General Assistance, are better-off than public assistance recipients with respect to the tobacco settlement for another reason as well. In 1995, the Minnesota Legislature enacted a law limiting the ability of private health insurance plans to seek subrogation for the costs of care provided to their insureds. The statute requires health insurance plans to provide an exercise of subrogation rights only after the injured insured has been made [sic] a full recovery from another source. Minn. Stat. § 62A.095, subd. 2 (1996).

Throughout the Tobacco Litigation, the State was challenged to explain the role that these plaintiffs and class members would play. Both the State and the Tobacco Litigation trial court recognized, at the very least, that the plaintiffs and class members were a necessary link in the causal

* * *

State's selective citation to the Settlement Agreement, deceptive rhetoric, and bluster is an attempt to disguise who is attempting to "grab" whose "dollars." The Attorney General hopes to discount and obliterate the rights of the State's most needy citizens after using their injuries and claims to attack "Big Tobacco". This lawsuit is aimed at correcting that wrong – by establishing the legal rights of 70,000 low-income Minnesotans who have yet again become casualties in the State of Minnesota's historic war against Big Tobacco.

Based upon the arguments set forth above, the State's Motion to Dismiss and For Sanctions should be denied.

Dated: September 4, 1998

MESHBESHER & SPENCE LTD.

/s/ Anthony J. Nemo

Anthony J. Nemo (#221351)
Ronald I. Meshbesher (#72229)
1616 Park Avenue South
Minneapolis, MN 55404
(612) 339-9121

Hugh V. Plunkett, III (#87282)
Robert K. Shelquist (#21310X)
PLUNKETT, SCHWARTZ, PETERSON, P.A.
East Bridge at Riverplace
10 Second Street N.E., Suite 114
Minneapolis, MN 55413
(612) 378-3700

John A. Cochrane (#17577)
COCHRANE & BRESNAHAN
24 East 4th Street
St. Paul, MN 55101
(612) 298-1950

No. C6-00-587

State of Minnesota

In Supreme Court

Jesse Lee Brown, et al. v. State of Minnesota

PETITION FOR REVIEW AND APPENDIX

Date of Filing of Court of Appeals Decision: September 19, 2000

STATEMENT OF LEGAL ISSUES

Can the State institute a self-styled direct action – claiming, settling, and collecting its expenditures on medical/general assistance recipients' injuries, and releasing third parties from all further liability for those damages, without implicating rights and protections of the medical and general assistance statutes?

The District Court dismissed this declaratory judgment action, holding in the affirmative. The Court of Appeals affirmed, holding "the State's lawsuit was outside the scope of these statutes," while simultaneously finding that "any claim the State may have had for these damages was settled."

Does an assistance recipient automatically assign to the State her cause of action as held by the Court of Appeals, or only her right to payment for State-paid benefits as argued by the State and decided by the Court in *Martin v. City of Rochester,* 615 N.W.2d 867 (Minn. App. 2000) (Pet. for Rev. pending)?

The District Court never reached the issue dismissing the Amended Complaint seeking a declaratory judgment for failure to state a claim. Affirming, the Court of Appeals concludes that the recipient's cause of action is assigned in total to the State which becomes its sole owner, but fails to consider the recent contrary Martin opinion or inconsistencies with the statutes.

When the State unilaterally brings, settles, and releases damages claims for medical or general assistance recipients' medical expenses, thereby barring injured recipients from ever seeking medical costs as part of their causes of action against liable third parties, are the statutory allocation formulae contained in Minn. Stat. § 256B.042, subd. 5, 256B.37, subd. 4, and 256D.037, subd. 8(f) applicable to the recovery?

The District Court never directly reached the issue in dismissing for failure to state a claim. The Court of Appeals affirmed, finding that the State solely owns the damages claims, thus the recipients lost nothing, and the formulae only protect recipients who prosecute their own actions.

Can the State unilaterally bring, settle, and/or release all claims for recipients' injury-related medical expenditures, without extinguishing its statutory lien and subrogation interests in all injured recipients' remaining causes of action against the same third parties?

The District Court never reached the issue in dismissing the Amended Complaint despite appellants' explicit prayer for declaratory relief. Despite appellate briefing and argument, the Court of Appeals never mentions or resolves this important issue.

STATEMENT OF CRITERIA SUPPORTING REVIEW

This petition is filed on behalf of two named individuals and approximately 70,000 of Minnesota's neediest citizens[1] – all medical or general assistance recipients who the State proved were hopelessly addicted and whose certain medical cost claims were compromised and settled without notice, participation or compensation by the State in its tobacco litigation. Review is sought pursuant to Minn. R. Civ. P. 117 under the criteria of subd. 2(a) and (d). The issues presented are important, of first impression, and require clarification and harmony with decisions where the recipient, and not the State, has prosecuted an action. The issues affect tens of thousands of recipients of medical benefits – both in this case and beyond. The Appeal Court's opinion jeopardizes recipients' rights, the State's obligations, and calls into question the entire statutory framework by extending State authority to extinguish the rights of thousands of its citizens without due process of law. It is also in contradiction to the Appeals Court's most recent opinion in august which sets forth what is automatically assigned to the State and thereafter jointly owned with the recipients.

STATEMENT OF THE CASE

The issues here are of first impression. The State brought its unprecedented "tobacco" lawsuit against

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[1] The medical/general assistance umbrella encompasses a wide array of needy individuals, including aged, blind, disabled, AFDC families and others. *See e.g.*, § 256B.55.

tobacco companies, claiming as monetary damages the monies spent for smoking-related illnesses on medical and general assistance recipients pursuant to Minn. Stat. § 256B and 256D. The State released the tobacco companies from liability for over $6 billion over time – $1.31 billion of which was solely attributable to past MA/GA expenditures it had made on behalf of approximately 70,000 recipients. These plaintiffs[2] and putative class of assistance recipients then sought a declaratory judgment is clarify: (1) whether they are entitled to at least one-third of the $1.31 billion recovery (or approximately $6,000 per recipient) as provided in three statutes; and (2) whether the State's statutory liens and subrogation interests against any remaining personal causes of action have been legally extinguished based on the State's settlement.

Despite having claimed, settled and released these damage claims, the State denied that any rights of the medical/general assistance statutes were even implicated by the settlement. The District Court agreed, dismissed the case without reaching any of the legal issues on which appellants sought declaratory judgment, and sanctioned appellants' law firms for bringing the case. The Court of Appeals reversed the sanctions, but upheld the dismissal on two grounds. First, without recognizing the State's

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[2] The Court of Appeals' opinion does not consider that named Plaintiff Jesse Lee Brown was identified *by the State* as an injured recipient whose damages the State sought. He cooperated and was deposed by tobacco defendants, only to have a portion of his claims settled without any notice, sharing, or satisfaction of liens and subrogation interests the State still possesses for these same costs.

damages claim for MA and GA costs in its tobacco lawsuit (its damages model being comprised of MA and GA costs for these 70,000 recipients), or its settlement of these claims, the Court held that "the State brought a direct action" and that the State's "claims did not implicate the medical-and general-assistance statutes." (A-037). Second, the Court held that, although the settlement agreement releases the tobacco defendants from all liability for past and future medical expenses and extinguishes plaintiffs' rights to seek these damages and share in their recovery, the statutory formula are inapplicable unless the GA or MA recipients recover as the named-plaintiff prosecuting the action. (A-038). Neither the District Court nor Appeals Court addressed whether State lien and subrogation interests survive against appellants' personal causes of action following the State's settlement and release which results in more than full recovery.

ARGUMENT

The Court's holding creates a massive loophole for the State, permitting it to recover medical and general assistance expenditures for recipients' injuries entirely outside the federal or state statutory framework. This loophole eliminates the balance of reciprocal rights and benefits provided by the statutes. The State may now prosecute unilateral lawsuits or negotiate global settlements, without notifying or involving injured citizens, yet settling part of their damages claim and barring them from ever claiming them again – all without compensation under the statutory sharing formulae and without satisfying or extinguishing the State's lien/subrogation rights in the injured recipients' personal lawsuit. This

new legal framework creates a race to the courthouse, raises serious issues of unjust taking, due process and equal protection, and leaves injured welfare recipients vulnerable to the unilateral exercise of State power to settle away their claims without any right or remedy.

The Appeals Court decision mistakenly analyzes the statutory recovery sharing provisions of the MA and GA statutes only in terms of "how" the State prosecuted its actions and not in terms of what the MA and GA recipient assigned as a condition of receiving State-paid medical treatment or what was settled. "How" the State recovers is irrelevant. As to what is assigned, the Appeals Court finds that the recipients assign away their cause of action to seek medical costs and, paradoxically, only regain the cause of action by prosecuting a claim not owned: "In this case, Appellants did not pursue the tobacco defendants and have not lost their causes of action for their own alleged injuries." (A-042).[3] Nothing in the statute supports this court-created policy decision to strip recipients of a portion of their causes of action. *See, e.g.*, Minn. Stat. § 256B.042(5). More importantly, the decision in this case directly contradicts a two-month old

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[3] The Court of Appeals simply asserts that sharing a recovery only with the injured recipient who actively prosecutes third parties as a plaintiff is a "policy decision" that has been made by the Legislature and does not consider the constitutional implications created thereby. (A-042). Nothing in the legislative history suggests this was discussed. Even if the MA or GA recipient needs to be a "plaintiff," the Appeals Court never considers the fact that the plaintiffs *were* putative class members of *two* class actions against tobacco companies pending when the State filed its own lawsuit.

opinion holding that the MA and GA recipients automatically assign only rights *to payment* for medical care. *See Martin v. City of Rochester*, 615 N.W.2d 867, 869 (Minn. App. 2000) (*citing* 42 U.S.C. § 1396k (a)(1)(A) and Minn. Stat. § 256.015).

The Appeals Court further confuses the issue of when the statutory sharing formulae apply in the face of a State's settlement and general release of all claims brought and unbrought. Plaintiffs sought declaratory judgment pursuant to three state statutes which each provide essentially the same formula for distributing *any* recovery of monies from a third party liable for the injuries to "the State," the "medical assistance recipient," and the "plaintiff":

> Upon *any* judgment, award, or *settlement* of a cause of action, or *any part* of it . . . reasonable costs of collection including attorneys fees, must be deducted first. The full amount of medical assistance paid to or on behalf of the person as a result of the injury must be deducted next, and paid to the State agency. *The rest* must be paid to the *medical assistance recipient* or other plaintiff. The *plaintiff*, however, must receive at *least one-third* of the net recovery after attorneys fees and other collection costs.

Minn. Stat. § 256B.042(5) (emphasis added). This provision must be read in the context of the entire statute. § 256B.042 recognizes that causes of action against third parties "accrue to the person to whom care was furnished" (Subd. 1) and that third parties pursued are, in the first instance, "liable to the person . . . " (Subd. 3). The statutes give the State an automatic lien and subrogation interest on *all* causes of action of any nature owned by the

recipient and permit State reimbursement from recovery under any theory or characterization of damages. The statute also uses the terms "medical assistance recipient" and "plaintiff" in separate sentences. Minn. Stat. § 256B.042(5). The Appeals Court concluded, without discussion, that the cost sharing formula only apply when a recipient is the prosecuting plaintiff.[4] (A-039 – A-042). Yet, if the State recovers the same damages, no sharing formula exists – according to the court's opinion – and the recipient loses her claim and her statutory safety net of Subd. 5 without compensation. Supreme Court direction is required to consider and rectify the inequities and inconsistencies with both federal and state statutes created by the State's argument.

In the final and most glaring oversight, neither the District Court nor Appeals Court acknowledge that plaintiffs' Amended Complaint seeks a declaration that all lien interests and subrogation rights the State has in plaintiffs' remaining causes of action are satisfied, waived, or otherwise extinguished as a matter of law. The State now admits it settled all past and future MA/GA cost claims owned by these recipients, yet the Appeals Court decision nowhere recognizes that these admissions *mandate* a finding in favor of the plaintiffs on their prayer for a declaration of lien satisfaction and waiver. Supreme Court review and oversight is necessary to protect the

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[4] Two other possibilities exist. The Legislature intended that a "medical assistance recipient" always gets one-third of the net. Alternatively, two separate formulae apply – one for all medical assistance recipients and a second that only applies to medical assistance recipients acting as plaintiffs.

interests these 70,000 people have in any future claims they may prosecute against the tobacco defendants and to clarify the laws for all recipients.[5]

In sum, the District Court failed to declare the parties' rights and obligations and the Court of Appeals affirmed in a decision fraught with error and grave social policy implications.

Dated: October 19, 2000

By /s/ Robert K. Shelquist
One of the
Attorneys for Petitioners

Hugh V. Plunkett III
Robert K. Shelquist
J. Michael Schwartz
LOCKRIDGE GRINDAL NAUEN
100 Washington Ave. S., #2200
Minneapolis, MN 55401

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[5] The lien/subrogation provisions of the assistance statutes require notice to the State of a recipient's claims, judgment or settlement, give the State strong enforcement powers against all parties to such a lawsuit, and can be enforced by a wide array of State agencies or service providers. The powers of all these persons and entities to prosecute future tobacco actions now stand in doubt with no judicial resolution or clarification of the State's continuing lien or subrogation interests. *See* § 256B.042 (Subd. 2-4)

Ronald I. Meshbesher
Anthony J. Nemo
MESHBESHER & SPENCE
1616 Park Avenue South
Minneapolis, MN 55404

John A. Cochrane
COCHRANE & BRESNAHAN
24 East Fourth Street
St. Paul, MN 55101

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Jesse Lee Brown, and Ronald J. Bergerson, on behalf of themselves and others similarly situated, Plaintiffs, vs. State of Minnesota, Defendant.	Excerpts from TRANSCRIPT OF PROCEEDINGS File No. 98-11152

The above-entitled matter came on for hearing before the Honorable H. Peter Albrecht, Judge of the above Court, at the Brookdale Courthouse, Brooklyn Center, Minnesota, on the 16th day of September, 1998.

* * *

[26] medical expenses, in no event. Now, that's the safety net that's been taken away from them and you can see it in smoking-related litigation with all the comparative fault, the State readily acknowledges in its brief individual claims in smoking cases are rarely successful. They cite a law review article that very thoroughly covers that.

Now, if a claim is brought by one of these 70,000 victims, and let's say they have got 50,000 medical expenses all paid for by the State, and they seek $200,000 in damages but the jury, in its providence, awards only $50,000, then that recipient would be entitled to one-third of that regardless of how the State did it and we think it

was an excellent trial, great result, they have eliminated all future and past medical expense payments for these recipients. That was the safety net that the legislature provided on a reciprocal basis.

THE COURT: Okay. Thanks.

MR. PLUNKETT: Thank you, Your Honor.

THE COURT: Mr. Ciresi, this will have to be the end of it.

MR. CIRESI: Very quickly. Mr. Plunkett, at the end there, I think answered the Court's question. There is no right under the statute to bring a cause of [27] action by the welfare recipients, none. The statutes create a right for the State. What the individuals can do is bring an individual personal injury action. If they did, the statutes provide that the State can come back and get some money, that's what the statute provides, and what they say there is that if the State does that, and there's a settlement or a judgment, then the formula applies. But we don't have that situation here and the reason for that was to provide an additional remedy for the State, not for welfare recipients. So what Mr. Plunkett is arguing, he says, "Well, wait a minute, the State for what it paid. We didn't pay a penny so we have no standing in fact. There's no statute that gives us a right but the State had a better case." I wish he would have been with us four years ago when everybody said we were smoking something but it wasn't a regular cigarette when we brought the cause of action. But now he's saying "Hey, it was a great case, they did a great job. So I tell you what, give us welfare recipients," and I don't mean that in a negative sense at all, but "give us the money that you paid to treat

our illnesses which we didn't pay a penny because we didn't want to bring an individual cause of action unless you want to take a look over in St. Paul because we are bringing an [28] individual cause of action and we are seeking these damages." They are not prevented from bringing a cause of action. They've got one. If they paid some medical expenses, they can put everything in. The State doesn't have a right to a penny and if they tried to recover what the State set out, you know what the tobacco industry would do. That's why you have the settlement agreement wherein the way it is, the tobacco industry would say, "Wait a minute, you can get all your damages that you want, you can't get what the State paid, we've already settled that part, that's done. You never paid a penny for that, you are not entitled to it and no statute created a cause of action for you." That's what we are talking about here, Judge. They have turned this thing completely on its head.

You know, we have said what we think of their cause of action. I'm not going to get into that. But the fact is this is relatively simple. There is no cause of action for them created under these statutes. None. Thank you, Your Honor.

THE COURT: We haven't gotten into the sanctions issue, do either of you want to be able to argue that?

MR. CIRESI: No, we'll rest on our papers, [29] Judge.

MR. MESHBESHER: I was going to discuss it but I'm confident our briefs take care of that issue.

THE COURT: Okay. Thank you. Thank you for being willing to come out here and get out here in the suburbs. It was a last minute assignment change that I got stuck with and I had to move dozens of lawyers out here this week and I appreciate not only getting out here, but getting here as early as you did so I get to the next one by 8:30.

MR. CIRESI: Thank you, Judge.

MR. PLUNKETT: Thank you.

(Whereupon, the proceedings were concluded.)

* * *

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN
FOURTH JUDICIAL DISTRICT

JESSE LEE BROWN and
RONALD J. BERGERON,
on behalf of themselves and
all others similarly situated,

Plaintiffs,

vs.

THE STATE OF
MINNESOTA,

Defendant.

Case Type:
Declaratory Judgment

Court File No.: 98-11152

Excerpts from

THE STATE OF MINNESOTA'S REPLY MEMORANDUM IN SUPPORT OF THE STATE'S MOTION TO DISMISS AND FOR SANCTIONS

* * *

in the cigarette case, the State chose to proceed in a direct action, as opposed to utilizing the statutory remedies provided in the Medicaid statutes.[4]

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[4] The frivolity of class counsel's position is further demonstrated by the fact that under a variety of doctrines in Minneosota law a claim for payment of medical costs ultimately rests, by operation of subrogation or statute, with the entity that paid the medical bills. See e.g. the Minnesota collateral source statute, Minn. Stat. § 548.36 (payments made on plaintiff's behalf by a "public program providing medical expenses" that are not subject to an asserted claim of subrogation must be

The personal injury claims of the welfare recipients against the cigarette industry – for pain and suffering and their own economic loss – are unaffected by the State's direct action and, indeed, are currently being prosecuted in a personal injury class action in federal court in St. Paul. The State settled only the State's claims,[5] not the personal injury claims of recipients.

As noted above, even class counsel now concede that the only claim at issue in this class action is one for "past and future medical expenses" paid for by the State. Thus, these class members have alleged no loss in this action. To have standing to bring a claim, a person must have suffered some injury in fact as a result of the alleged actions. *Epland v. Meade Agency Ins.*, 564 N.W.2d 203, 208 (Minn. 1997), *cert. denied* 118 S.Ct. 181 (1997). This "injury-in-fact" is also required before a party can seek a declaratory judgment. *Kennedy v. Carlson*, 544 N.W.2d 1, 3 (Minn. 1996). Since class plaintiffs are not entitled to recover reimbursements for payments they did not even make, they have suffered no injury and have no standing. *See Byrd v. Independent School District No. 194*, 495 N.W.2d

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eliminated from any personal injury award to a plaintiff). *Cf.* Minn. Stat. § 256B.056, subd. 6 ("By signing an application for medical assistance, a person assigns to the department of human services all rights the person may have to medical support or payments for medical expenses from any other person or entity . . . "); Minn. Stat. § 256D.03 (establishing identical requirement for General Assistance.).

[5] Thus, the State would not have a claim out of any recovery by welfare recipeint/smokers in the personal injury class action in St. Paul for Medicaid or General Assistance payments for smoking-related diseases.

226, 231 (Minn.Ct.App. 1993) (construction union lacked standing to seek declaratory judgment that contract is void because it could not show that it would benefit from declaration), *pet. for rev. denied* (Minn. April 20, 1993); *see also Lines v. Ryan*, 272 N.W.2d 896, 903 (Minn. 1978) (where insurance company fully pays losses suffered by insured, it, not the insured, is the real party in interest in action to recover those losses.).

When all is said and done, and class counsel's rhetoric stripped away, their complaint is this: The Medicaid and General Assistance recipients, who could not afford medical treatment, were afforded these benefits by the State. The State paid the medical bills. Now, class counsel demand that the State – which already paid the medical bills – also pay the Medicaid recipients billions of dollars that the State recovered from the cigarette industry for, *inter alia*, the payment of these bills by the State in the first instance. The logic is absurd; the complaint is frivolous. Accordingly, the class action complaint should be dismissed, with sanctions.

Dated: September 11, 1998.

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

/s/ Thomas F. Pursell
THOMAS F. PURSELL
Senior Counsel
Atty. Reg. No. 12168X
Suite 1400, NCL Tower
445 Minnesota Street
St. Paul, Minnesota 55101-2131
(651) 296-7579 (Voice)
(651) 297-7206 (TTY)

PATRICIA A. SONNENBERG
Assistant Attorney General